

**SOUTH AFRICAN HUMAN RIGHTS COMMISSION**

**FAULTLINES:  
INQUIRY INTO RACISM IN THE MEDIA**

*Everyone is equal before the law  
and has the right to equal protection  
and benefit of the law.*

- Section 9(1) of the Constitution

**A SAHRC REPORT**  
August 2000

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## PREFACE

It was obvious to us from the beginning that an investigation into racism in the media of the kind we embarked upon was an ambitious project. And yet we may have underestimated the enormity of the task. It was not just the workload that we took upon ourselves but the emotional and intellectual challenges that we had to face throughout the process. Many of the people we found ourselves at loggerheads with were in agreement with us on the essential matters. We acknowledge our common commitment to the promotion and protection of human rights, to honouring our Constitution and building a South Africa free of racism. Until this process began, we may not have realised how far apart we were about what, in practical terms, this meant and what strategies were necessary to usher in a new society. Through this process we engaged with each other, at times painfully, about exactly those matters. Others might have preferred to let sleeping dogs lie!

This inquiry was an example of the practical application of human rights. We sought to understand the core content of the rights, examine the relationship between the rights, heard how the media practitioners understood and applied these rights in their ordinary work environments. The Commission served as an interrogator of cherished ideals, challenged assumptions and sought to test commitment to some core principles. Even more exciting, we found ourselves developing, *albeit* at an embryonic level, a theory and praxis of freedom of expression, in particular, freedom of expression as it applies to the press and the media. It has become evident that in an environment like South Africa's it was no longer good enough to spout some universal principles without contextualising these and testing what effect they would have when applied. What we sought to do in this report was to let the rights speak to the South African situation.

The examination of the evidence was a complicated exercise. We have sought nonetheless to present what we heard and what we read as faithfully as we could. Of necessity we have had to be selective. We hope, however, that in the process we have not misrepresented any submissions made to us. The report has been structured in a thematic format. We believe that it makes better reading that way. In examining the evidence, we have gone beyond the arguments that were presented to us. We used this as an opportunity to elaborate on some theories and principles of the relationship between human rights and the media; an exercise rarely attempted under one cover previously. In this sense the project is an ambitious undertaking and a risky one at that! We have presented an analysis of racism and racial discrimination and raised questions about the legal and constitutional implications thereof.

We expect that this report will be subjected to clinical dissection and analysis. We believe that it will provoke debate about racism in South Africa, about the extent and limits of freedom of speech and about human rights in general. At all times, we hope that there is agreement that at the

end we seek to construct a free press in the service of democracy and for the preservation of our constitutional, rights-based system. At the same time, it is such a democracy that will protect and preserve freedom of the press. Racism undermines these ideals. We have entitled this report, *FAULTLINES* because we sincerely believe that racism marks a volcanic faultline in our body politic. This report is dedicated to the South Africa we love.

A project of this size would never have been possible without the participation of a large number of people. As a panel, we wish to thank all those who appeared before us. We sensed that this inquiry would be a defining moment for many of us as we continue to build the new South Africa. There have been times of difficulty but in the end virtually everybody recognised the importance of the exercise and shared their deepest thoughts and heartaches about racism and the dilemmas they face. The inquiry was, we like to believe, an exercise in dialogue. We trust that the dialogue will continue within the media industry.

Second, the professional assistance of Adv. Dabi Kumalo of the Pretoria Bar and Mr M C Moodliar, Head of Legal Services at the Commission made our work manageable. Among commissioners, Jody Kollapan and Pansy Tlakula co-ordinated the project. Support staff at the South African Human Rights Commission worked long and hard over a very long time to bring this project to fruition. It is difficult to single out individuals but to mention Pat Lawrence and Mothusi Lepheana would not be indulging in extravagance. The independent researchers engaged by the Commission bore the brunt of the anger the inquiry initially unleashed, but their reports were invaluable in defining the theoretical and analytical terrain that had to be traversed. We are deeply indebted to Claudia Braude and the Media Monitoring Project (MMP). We hope that they have not been too discouraged and that they would agree that it was, in the end, a worthy effort. We thank them. Not for the first time, the South African Human Rights Commission has turned to the Johannesburg Metropolitan Council for assistance, and was not disappointed. Special thanks are due to the Mayor of Johannesburg, His Worshipful Councillor Isaac Mogase who placed the resources of the Council at our disposal. The staff, led by John Hood, was always ready to assist. Thank you.

Our last word: Let this report speak. Let it speak to this nation. Let it speak to the hearts of every media practitioner in the country and let it guide every human rights advocate, inform and inspire the work of every anti-racism activist.

N Barney Pitso (Chair)

Jerry Nkeli

Charlotte McClain

Margaret Legum

Joe Thloloe

Johannesburg, 18 August 2000.

# SECTION I

## INTRODUCTION

The South African Human Rights Commission is an independent national state institution provided for in Chapter 9 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).<sup>1</sup> It is one of the state institutions supporting constitutional democracy. The Constitution came into effect on 7 February 1997. The Commission was established in terms of the Human Rights Commission Act, 1994 (Act No 54 of 1994)<sup>2</sup>. Following due parliamentary process, the President appointed eleven members of the Commission who then assumed office on 1 October 1995.

The powers, functions and competence of the South African Human Rights Commission are suitably summarised in the Preamble to the Act:

*Whereas* the Constitution provides that the Human Rights Commission shall, *inter alia*, be competent and obliged to promote the observance of respect for and the protection of fundamental rights; to develop an awareness of fundamental rights among all people of the Republic; to make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution; to undertake such studies for report on or relating to fundamental rights as it considers advisable in the performance of its functions; to request any organs of state to supply it with information on any legislative or executive measures adopted by it relating to fundamental rights and to assist any person adversely affected thereby to secure redress.

The Interim Constitution sets out the Powers and Functions of the Commission in Section 116, *inter alia*:

The Commission shall be competent to investigate on its own initiative or on receipt of a complaint, any alleged violation of fundamental rights, and if, after due investigation, the Commission is of the opinion that there is substance in any complaint made to it, it shall insofar as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress, and where it is necessary for that purpose to do so, it may arrange for or provide financial

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<sup>1</sup> The Constitution of 1996 is a successor to the Interim Constitution, Act 200 of 1993. The Commission was established initially in terms of Sections 115 and 116 of the 1993 interim Constitution. The Powers and Functions of the Commission are set out in Section 116. Section 20(2) of Schedule 6 of the Final Constitution states that

A constitutional institution established in terms of the previous Constitution continues to function in terms of the legislation applicable to it, and anyone holding office as a commission member.... When the new Constitution takes effect, (it) continues to hold office in terms of the legislation applicable to that office, subject to –

- a) any amendment or repeal of that legislation; and
- b) consistency with the new Constitution.

<sup>2</sup> The name of the Commission was changed to “South African Human Rights Commission” by amendment to the Constitution in 1999.

assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum.<sup>3</sup>

Section 184 of the final Constitution captures the essence of the mandate of the Commission as more fully elaborated in the Interim Constitution and the Act; notably the power to “investigate and to report on the observance of human rights...”

### **THE COMMISSION: ITS MODE OF OPERATION**

In order to understand more clearly the value of a national institution and how it can more effectively carry out its mandate and functions, it is necessary to bear in mind that the Commission functions in a holistic fashion. The various functions of the Commission cannot be viewed in isolation of each other. They must be viewed cumulatively as each reinforces the other. For example, the task of protecting human rights is served by investigating complaints and making findings and recommendations. The work of investigating violations of human rights is also a means of promoting human rights. The second matter to note about a national institution is that it is not a court. Its greatest asset is that it can provide redress more speedily in a simple, client friendly environment at little or no cost to the complainant and with minimum bureaucratic redtape. In return, the decisions of the Commission do not have the force of law as a court would have. They are not automatically binding and enforceable. The Commission is required to make “findings and recommendations”. The authoritative nature of the findings of the Commission lies not so much in their judicial enforcement as in their moral authority.

Third, it should be recognised that although the Commission is obliged to abide by the rules of natural justice and fairness, it has the authority to cut through the normal red-tape of judicial procedures so that, while mindful of the law and the Constitution, it may better realise its fundamental duty to promote and protect human rights. This practice, it will be understood, is vital to ensure that the Commission is accessible and comprehensible to the people who will need its services most. The interim Constitution recognised this relationship between an independent national institution and the courts. It noted that the Commission may seek to secure redress, insofar as it is competent to do so, or “may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum.” It cannot be, therefore, that the Commission is a substitute for the courts. The right of access to the courts (Section 34) cannot be impugned by the operations of the Commission. Finally, as an independent institution, the Commission has to exercise functional or operational independence. That means that within

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<sup>3</sup> In our view this sub-section has not been adequately captured in the Final Constitution.

the broad parameters of its mandate, the Commission must be free to make choices, determine its procedures and set its priorities.<sup>4</sup>

### THE BLA/ABASA REQUEST

In 1998, the Commission received a request, in terms of Section 7(1)© of the Human Rights Commission Act, 1994 (Act No 54 of 1994), from two professional bodies, the Black Lawyers Association (BLA) and the Association of Black Accountants of South Africa (ABASA) to investigate two newspapers publishing from Johannesburg: the *Mail and Guardian* and the *Sunday Times* for allegedly been guilty of racism. The law gives the Commission discretion whether to consider such requests or not. Having considered the dossier of allegations against the newspapers concerned, the Commission submitted them to the newspapers for a response. The response was a refutation of the allegations together with a challenge to the jurisdiction of the Commission and the *locus standi*<sup>5</sup> of the authors of the communication. The Commission rejected the suggestion that the authors had no *locus standi*. It asserted that “as a professional body representing the interests of black people” the two organizations had a legitimate interest in the matter. Regarding the challenge to the jurisdiction of the Commission, it

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<sup>4</sup> Internationally, the role and status of national institutions is regulated by the Paris Principles which were adopted by the General Assembly of the United Nations by Resolution 48/134 of 20 December 1993. The Paris Principles have now become a common standard for all national institutions. They are the basis for accreditation of national institutions with the UN Commission on Human Rights which regulates participation in the sessions of the Commission. On independence, the Paris Principles state that:

Within the framework of its operation, the national institution shall

- a) freely consider any questions falling within its competence, whether they are submitted by Government or taken up by it without referral to any higher authority, on the proposal of its members or of any petitioner.
- b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
- c) ..... and
  - seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;
  - informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
  - Making recommendations to the competent authorities, especially by proposing amendments or reforms to the laws, regulations and administrative practices especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

The South African Human Rights Commission has been duly accredited by the International Co-ordinating Committee of National Institution and enjoys a status at the UN Commission on Human Rights that is distinct from state delegates and NGO observers. The Paris Principles guide the Commission in its work.

<sup>5</sup> There appears to be some confusion about the use of these expressions in the submissions. Clearly what was suggested was that BLA/ABASA did not have *locus standi* to initiate action in the Commission against the two newspapers. Secondly, the Commission, it was alleged, did not have jurisdiction to deliberate on the matters placed before it.

cited the Preamble to the Act which states that the Commission shall “be competent and obliged” to investigate any allegations of violations of human rights. In addition, Section 184(1) of the final Constitution, 1996 obliges the Commission to “monitor and assess the observance of human rights.”

Nonetheless, the Commission resolved that it would not accede to the request as put. The Commission felt that some vital matters were raised in the papers before it and that some further work was warranted. At the plenary meeting of the Commission held in Johannesburg on 11 November 1998 and after a full debate, the Commission resolved to conduct an investigation into racism in the media as a whole, given the importance and seriousness of the allegations which were being made. The resolution of the Commission states, in part:

The purpose of the investigation will be to monitor the representation and treatment of racism, sensitivity to equality as pertains to race, ethnic or social origin, colour, culture, language or birth. The Commission hopes that the process will facilitate a robust debate and exchange of ideas about how we can construct a society free of racism.<sup>6</sup>

In a press briefing announcing the Commission’s intention, we suggested that the Commission set itself the following goals for the inquiry:

First, we hope that the inquiry will generate debate and dialogue among South Africans about the nature, meaning and incidence of racism in South Africa. Two, we believe that South Africans need to be informed about racism if they are to be able to address it. Three, we believe that the media will benefit from closer scrutiny so that they can sharpen their capacity to be responsive to the needs of the people and reflect the nature of South African society. Four, we believe that South Africans, through dialogue, will learn, understand and have the facility to use race theory and analysis .....Five, we believe that a probe of this nature will engage all South Africans in seeking common solutions to racism and constructing a society free of racism.<sup>7</sup>

The communiqué set out in considerable detail its decision and the rationale for it, how it saw the inquiry, the process it intended following and the outcomes it wished to achieve. In doing this, the Commission sought to inform, in an open and unambiguous manner what it saw its task in undertaking the inquiry. The Commission further indicated that it would be prepared to use the powers it had, if this became necessary, to conduct such an inquiry.

Much has been made of this issue, unnecessarily so in our view. The powers of the Commission are granted to it by the legislature in order to ensure that it is able to discharge its mandate properly and effectively. These powers, including that of search and seizure and subpoena, are consistent with the Paris Principles which have become the international yardstick by which the independence and efficiency of national institutions are judged.

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<sup>6</sup> Para IV of Statement. Reference to right to equality taken from Section 9(3) of the Constitution, 1996 (Act No 108 of 1996).

<sup>7</sup> P.2; para 6 of statement of 16 November 1998.



At a media conference called specifically for the purpose of communicating its decision to the public and the media, the Commission reiterated its intentions stance and the non-confrontational approach it sought to take. In response to a question on the use of the Commission's powers during the inquiry, the Commission acknowledged that it had significant powers in order to properly discharge its mandate and that it would, if necessary, use such powers. When specifically requested to comment on the power of subpoena, the Commission said that it would, again only if necessary, be prepared to use such powers.

Much of the media coverage that followed immediately after the announcement of the inquiry chose to ignore what the communiqué had sought to convey. Instead considerable time and attention was paid to the issue of the possibility of subpoenas being issued – a side issue in our view. There was little examination or response given to the rationale for the inquiry, the issue of racism in the media or the transformation of the media as we had hoped there would be.

The principal focus at the time was that the inquiry represented a threat to media freedom and that the possibility (as it then was) of journalists being subpoenaed was an anathema to a free press. None of the arguments sought to explain or justify the conclusions drawn and the public was fed a regular diatribe of a brave and fearless media under attack.

The interesting question of the public's right to receive information as enshrined in Section 16 of the Bill of Rights arises. Did the media coverage of the announcement of the inquiry sufficiently discharge its obligation to inform the public? A cursory examination of the media at the time (with a few notable exceptions) indicates a failure by the media to discharge this obligation, which in our view is inextricable intertwined with the freedom of the press. The interim report contains a selection of some of the coverage at the time and the thrust and impact thereof are self-evident.

What was emerging was that the media had chosen to interpret the inquiry and its consequences for media freedom in a certain way and, with respect, in a way that substantially ignored the reasons advanced by the Commission. This was most vividly illustrated in a meeting held shortly after the announcement of the inquiry with certain representatives of the media. They (the media) had in preparation for meeting with the Commission armed themselves with the various articles in the media covering the announcement as the basis of their understanding of the inquiry. The communiqué the Commission issued and distributed at the press conference convened in November 1998 was not part of their preparation for the meeting, a glaring omission in our view.

The Commission anticipated criticism but at the very least expected that it would be informed; that there would be balanced coverage on the response of the media as well as the rationale advanced by the Commission for the inquiry. This did not happen and unfortunately this biased and ill informed approach characterized much of the media coverage on the inquiry since

then and the injustice of it all was that it prevented an important debate on the question of race in the media happening amongst the people of South Africa. A grave disservice was accordingly done to the readership of most of the publications in our country by those responsible for providing such information.

The Commission appointed a working committee consisting of Commissioners and senior staff to oversee the inquiry and report on a regular basis to the plenary of the Commission on the progress and developments with regard to the inquiry.<sup>8</sup>

### **TERMS OF REFERENCE AND PROCEDURES**

The Commission proceeded with the steps necessary to advance the inquiry and the first of these was the preparation and publication for comment of the draft terms of reference for the inquiry. We appreciate the comments received from the various quarters, accommodated to the extent possible some of the suggestions made and proceeded to finalize the terms. These, together with a call for submissions based on the terms of reference were published.

The terms of reference were stated as follows:

- a) to investigate the handling of race and possible incidence of racism in the media and whether such as may be manifested in these products of the media constitutes a violation of fundamental rights as set out in the Constitution;
- b) to establish the underlying causes and to examine the impact on society of racism in the media if such racism is found to be manifested in the products of the media; and
- c) to make findings and recommendations as appropriate...<sup>9</sup>

During this period various meetings were arranged with representatives of the media principally to explain the process and the intended outcomes. We found most of those meetings useful. Clearly it was not the purpose of such meetings to reach consensus and obtain support for the inquiry from the media. Rather as a national institution embarking on a project of national significance for our country we saw it as our obligation to communicate that intention and the proposed action as accurately as possible.

This unfortunately was made even more necessary by the problematic media coverage the inquiry received and which is detailed more fully above. Accordingly we were happy with the meetings and what they achieved and certainly at the conclusion of that process we believed that there was an increased and more sophisticated understanding of the proposed inquiry (not necessarily an acceptance thereof).

The procedure for the inquiry required the commissioning of research. The Commission proceeded to advertise for the position of an independent

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<sup>8</sup> The members of this committee were: Commissioner Kollapen (Chairperson), Commissioner Tlakula, M.C. Moodliar (HOD, Legal), T. Thipanyane (HOD, Research) and P. Lawrence (Executive Secretary).

<sup>9</sup> Para 4.2 of Terms of Reference as published in Government Gazette

researcher and administrator for the inquiry. There was considerable interest shown in the position and the applicants were of a high calibre. Three candidates were shortlisted and interviewed by the working committee and a recommendation was made to the plenary of the Commission to appoint Ms Claudia Braude for a period of six months to undertake the required research.

The committee worked with and assisted Ms Braude in developing her brief and received regular reports from her regarding the progress made with the research. At the same time Ms Braude's independence as a researcher was respected and the observations, conclusions and recommendations she arrived at were done so independently. In this context it is very important to state categorically that what the Commission set out to do was to commission independent research. The report it received was the report of an independent researcher. The observations, conclusions and recommendations were those of Ms Braude and whether or not the Commission agreed or disagreed with them was academic. In fairness to Ms Braude, who came under considerable and in our view, unwarranted personal attack at the time, the Commission has and continues to respect the integrity, professionalism and commitment she had brought to bear on her work. Her research has formed an integral part of this process and the vilification she had to endure at the hands of the media left much to be desired.

During the course of Ms Braude's research it became evident that her work would be incomplete if we did not engage in some quantitative analysis of the incidence of racism in the media. The Media Monitoring Project was engaged to undertake research in that regard and again the whole Commission was involved, as it had to be, in developing and refining the brief. The research was undertaken independently and the conclusions, observations and recommendations that followed were those of the Media Monitoring Project.

We think it is important to emphasize that the Commission does not seek to create the impression that it wishes to distance itself from the research reports. The integrity of the inquiry and the independence the Commission had to display simply meant that, of necessity, those reports had to remain independent reports. This did not mean that the Commission did not agree with the contents of these reports as some have now mischievously sought to suggest.

## **THE SUBMISSIONS**

The Commission received 13 written submissions. In the main they were well researched, showed a good understanding of the terms of reference and generally reflected a sincere desire to engage the issue of racism in the media. Much has been made of the fact that only 13 written submissions were received. It is not clear to the Commission what the desired number

should have been. We are indeed indebted to all those who took the time to make written submissions.

A cursory analysis of their origins indicates that they represent a significant proportion of the South African population – Black professionals, the Jewish, Muslim and Afrikaner communities. In addition the individuals who made submissions were in significant ways articulating what many other South Africans felt and believed. The letters pages of our newspapers and the talk shows on radio generally reflected the deep concern and unhappiness people had about the issue of racism generally and its manifestation in the media in particular.

### **THE INTERIM REPORT**

In accordance with the terms of reference the Commission compiled the Interim Report which was released on the 22<sup>nd</sup> November 1999. This report was essentially an accumulation of the research commissioned and the submissions received. It also set again the objectives of the inquiry and the terms of reference. The interim report was intended to become the basis further debate and response.

It attempted to express the views of those making submissions as well as the researchers, of how they saw the media, of their perceptions and understandings of racism in the media. At the very least it required a considered response. Prior to the public release of the Report, the Commission at great cost ensured that a copy of the Report was hand delivered to every media institution named in the Report or in the submissions. The purpose was to ensure that the media had the opportunity to read and study the Report before it became public. This approach, in our view, was consistent with our stated desire to conduct the inquiry in an open and non-confrontational manner.

While it may have been naïve to expect the media to concur with the contents of the Interim Report, we had certainly hoped that its release would allow the media the opportunity to share with the Commission its own understanding of race and how it did or did not as the case may be, manifest itself in the products of the media.

It will be recalled that none of the media choose to make a submission in response to the call for submissions. At no stage was the Commission ever appraised of how the media saw the issue of racism. Thus the Interim Report represented in our view a wonderful opportunity for the media to share with the Commission and indeed the nation its views on the matter. Attached to the Interim Report was a letter setting out in considerable detail the nature and status of the commissioned research and submissions, incorporating an invitation to the media to respond to the issues and allegations raised.

The response to the Interim Report came in two phases, distinctly separate but very much intertwined and following the same approach. There was the

response published in the media as well as the individual responses to the letters dispatched by the Commission. The Report was selectively savaged. There was little, if any attempt to read the report fully.

Selected portions or items, including photographs were chosen out of context and subjected to analysis. The researchers came under considerable professional, but mostly personal attack and there was very little evidence of a desire to engage the issues the Report raised – racism in the media, stereotyping etc. The negative coverage was persistent and relentless and what appeared to be a campaign aimed at generating hostility towards the inquiry developed.

The responses received to the letters of invitation were in similar vein. Technical and legal points were raised ad nauseam and numerous letters were produced in all haste asking questions of clarity, seeking more information, wanting to examine the minds of the authors of the reports and generally doing everything but responding to the report. Other responses were simply rude and abrasive, while some were cruelly cynical. In our view we had afforded the media an ample and reasonable opportunity to share their insights with us and to respond to the Interim Report, including the allegations made against them. Whether the allegations were of substance or not was not material, they called for a response and the media in the main chose not to respond.

From November 1998 the Commission had committed itself to a co-operative process and indeed had conducted itself in that fashion. The following is the manifestation of that approach; -

- We had publicly called for submissions to the terms of reference and encouraged the media to participate.
- We had included the media in the call for submissions and had hoped that they would share their perspectives at the time with the Commission.
- We had initiated and attended meetings with them in an attempt to explain the process and encourage their participation.
- We had made a report available for their comment and response and in a non-threatening manner had sought their co-operation.

The Commission also sought to distribute the Interim Report as widely as possible and in this regard made it available to organisations such as the IBA, the Press Ombudsman, selected NGOs and others with a request that they respond to the report in general but also to certain specific questions that in our view sought to advance the objectives of the inquiry.

It was evident that a deliberate policy of non co-operation was playing itself out. The correspondence revealed an intention to become technical and drag the matter out for as long as was necessary. In all of this the Commission was mindful that it had set certain time frames for the completion of the inquiry. We were committed to seeing them through and importantly we had a commitment to those who had made submissions as well as the public to continue with the process.

The co-operation of the media was certainly important to the process but awkwardly the process would continue and proceed to finality even without such co-operation. Clearly a national institution must strive to function in an environment of co-operation and negotiation, but when that is not possible it must be able to use its resources and indeed the powers granted to it by law to undertake its mandate.

### **THE SUBPOENAE SAGA**

We had committed ourselves to commencing the public hearings on the 1<sup>st</sup> March 2000. It was abundantly clear by the beginning of February that the media were unwilling to co-operate and a decision was required that would enable the public hearing to proceed with the attendance and presence of those who were relevant. It would not have been possible to proceed with the inquiry without the attendance of the media, particularly those against whom allegations had been made.

The matter came before the plenary meeting of the Commission in February 2000 and the working committee was mandated to use the powers of the Commission, including the power of subpoena - if this was necessary - to secure the attendance of any person at the hearing.

Section 9 of the Human Rights Commission Act, 1994 empowers the Commission to

Require any person by notice in writing under the hand of a member of the Commission, addressed and delivered by a member of staff or sheriff, in relation to an investigation, to appear before it at a time and place specified in such notice and to produce to it all articles or documents in the possession or custody or under the control of any such person and which may be necessary in connection with that investigation: Provided that such notice shall contain the reasons why such person's presence is needed and why any such article or document should be produced.

At this juncture two points need to be made: -

- The power of subpoena forms part of the broad powers granted to the Commission by the legislature and is integral to ensuring that the Commission is able to effectively discharge its mandate. It would be unthinkable if the Commission were to rely exclusively on the goodwill and co-operation of persons in order to undertake an investigation or inquiry.

This inquiry has displayed how futile such an approach can be. The subpoena power of the Commission has been consistently used as part of the investigations or hearings the Commission undertakes. It was used to secure the attendance of a Cabinet Minister, the former head of the Defence Force and others whose presence we regarded as necessary. Contrary to popular misconception it was not conceived specially for the media.

- A subpoena in the context of this inquiry was required to secure the attendance of witnesses. There was a clumsy attempt to equate that simple act with the actions of the former government which used

subpoenas to compel journalists to reveal their sources. We are unaware why the issue of subpoenas in 2000 was linked to the revelation of sources of the apartheid era, but can only speculate for now.

Acting on the mandate granted to it by the plenary of the Commission, the working committee decided to proceed with the issue of subpoena. At that point it was felt that it would be prudent to secure the attendance by way of subpoena of all parties who were relevant.

This was seen as unfair in some quarters, particularly by those who had indicated a willingness to support and co-operate with the process. Fearing that the Commission would be accused of bias and selectivity in respect of whom it chose to subpoena, we thought it prudent to be consistent in this regard and subpoenas were accordingly prepared and served on all whose testimony we believed was relevant to the investigation.

Predictably, there was a strong reaction. The commission was accused of draconian behaviour, we were made to believe that the freedom of the press was in grave danger, foreign media organisations urged the President to intervene and have the subpoena withdrawn, while in the National Assembly there was a suggestion from the opposition that the Human Rights Commission Act be amended to either remove the power of subpoena or to regulate its use.

To his credit, the President correctly resisted such calls arguing that it was inappropriate for him to interfere in the functioning of a national institution, while Parliament correctly resisted efforts aimed at amending the Human Rights Commission Act. Again during this time the media coverage remained firmly focussed on the subpoena – the issue of racism in the media appeared to have become a non-issue. There was a remarkable consistency in this entire inquiry of how the media ensured through their reporting that the issue at the heart of the inquiry – the incidence of racism in the media was relegated to a secondary or non-issue. In fact there appeared to be a deliberate attempt to convert other issues to focal issues e.g. the Braude report the photographs of the marabou storks, the subpoenas and so forth.

Notwithstanding the outcry from the media the Commission was able to detect a clear and discernible shift in the debate on the inquiry. More and more people were demanding that the issue of race in the media be examined, more people, while not necessarily supportive of the steps taken by the Commission, were encouraging the process that would examine race in the media. The public debate began to take on a different perspective, a perspective that was not possible earlier largely because of the hostility that accompanied media coverage of the inquiry. The Commission was encouraged by what it saw and heard. Intellectuals, commentators and the public in large numbers lent their voices and their support to the inquiry. We were encouraged not because we felt vindicated; rather the encouragement arose from the acknowledgement that we had finally, through our patience

and our persistence, ensured that the matter was firmly in the public domain for debate.

## CONSULTATIONS

The “problem of the subpoenae”, as it would become known, still hung in the air. Many now pledged their co-operation with the inquiry, indeed, said that they were always supportive of it and urged the Commission to withdraw the subpoenas. The South African National Editors Forum (SANEF) sought an urgent meeting with the Commission in order to discuss the matter.

On the 21 February 2000, 9 days before the hearings were scheduled to start, a meeting took place between SANEF and the Commission. SANEF accepted that there was racism in the media, said that they would urge their members to attend if the Commission withdrew the subpoena and pledged to work together with the Commission in order to ensure the success of the inquiry. It was a difficult meeting held in a civil environment and at the end thereof the delegation of the Commission undertook to consult with the rest of the Commission and thereafter to inform SANEF of its decision. That evening the Commission deliberated on the matter and felt that the offer by SANEF to “urge their members to attend” was not sufficient to warrant the withdrawal of the subpoenas and accordingly could not be accepted. SANEF was informed of this and advised that the Commission would be willing to withdraw the subpoena if there was a written undertaking that editors would appear at the hearing. To complicate matters, the media carried reports that the issue had been settled between SANEF and the Commission, whereas in fact it was not.

Immediately thereafter on the 23<sup>rd</sup> February 2000 a group of 5 Black editors announced that notwithstanding their opposition to the issue of the subpoena by the Commission, they saw the inquiry as a significant event in dealing with racism in our country and advised of their intention to attend.

During the same period we had received notification from the Media Monitoring Project that they would not voluntarily attend the hearings to present their report. Again in an attempt to resolve rather than compound difficulties the Commission met with the Chair of the Media Monitoring Project who refused, most unreasonably in our view, to reconsider their position. Again we were virtually compelled into issuing a subpoena in order to compel a party we had contracted to present its own report.

The countdown to the hearings had begun and the attitude of the Commission was that it remained committed to proceeding with the inquiry on the 1<sup>st</sup> March 2000, but at the same time remained open to discussing ways of ensuring the full participation and co-operation of all. It was this spirit that saw a meeting being convened between the Commission and representatives of most of the publishers on Friday 25 February. Again the meeting proceeded in what can be described as a serious and earnest attempt



to find a solution to what the media described as the problem of the subpoena. An indication of the seriousness with which the publishers approached the task was the remark of Mr. Cyril Ramaphosa that the meeting would continue until a solution was found. We found such an attitude encouraging.

The publishers on their part accepted the need for the Commission to undertake the proposed investigation, accepted the legality of the issuing of the subpoenas but argued that its removal would lead to the hearings being conducted in a more open and free environment and would encourage witnesses to speak openly and frankly about their experiences rather than being compelled under duress of a subpoena to attend and answer questions. They further indicated that they were quite certain that most of the editors who formed part of their group would attend the hearings and participate fully if the subpoenas were withdrawn. The Commission reiterated the circumstances that had compelled it to issue the subpoenas and reaffirmed its position that what it sought to do was to ensure attendance at the hearings of those who were required to attend. The Commission undertook to consider the request made by the publishers and to respond to them by no later than Monday 28<sup>th</sup> February 2000.

A preliminary discussion of the request of the publishers was held by the Commission late that Friday afternoon. Strong views were expressed on the matter and it was agreed that we would continue with the discussion on Monday the 28<sup>th</sup> with a view to taking a final decision. There were strong and compelling arguments from those who sought to retain the subpoena, while equally convincing arguments were advanced by those who sought its removal.

Those who sought the retention of the subpoena argued that we had no guarantee of appearance at the hearings, that the withdrawal would show the Commission as weak, that a withdrawal may set a dangerous precedent for the future when we sought to use the power of subpoena and importantly that a withdrawal would undermine the credibility of the Commission in the public eye.

Those who argued for the removal or suspension of the subpoena argued that the subpoena rather than the issue of racism had now become the focal issue – it was a red herring that required removal. It was further argued that the two meetings with SANEF and the publishers had shown a clear willingness to co-operate, that a removal would create an enabling environment to conduct the hearings in a non-adversarial way.

After much debate the Commission by a majority resolved to withdraw the subpoena, to revisit the matter after 48 hours depending on the nature of the co-operation offered and if necessary to reinstate the subpoena if that was required to secure the attendance of all relevant witnesses. The decision was without doubt one of the most difficult that the Commission was called upon to make and it was in the words of the Chairperson of the Commission, “a leap of faith”.

There was a perceptible sigh of relief from all and sundry after the announcement of the decision. An urgent meeting was held with some editors and their legal representatives to discuss procedural and other matters related to the hearings. Much progress was made during these discussions and at the end of day on the 29<sup>th</sup> February 2000 the Commission was satisfied that the hearings remained on track, that we had not abandoned the objectives underlying the inquiry and indeed that we had found an acceptable way to ensure the participation of all.

## **SECTION II**

### **THE EVIDENCE**

#### **INTRODUCTION**

Different sets of information were placed before the Commission by a variety of witnesses. In the first instance, the results of the research commissioned by the Commission were tabled before the panel. This was the evidence given by Ms Claudia Braude and the Media Monitoring Project (MMP). Ms Braude and Mr William Bird, who led the MMP team of researchers answered questions from representatives of the newspapers present and from members of the panel. A critique of the Braude and MMP reports was offered by academics Guy Berger and Lynnette Steenveld. This discussion is captured in Section C of this Report. A selection of the submissions tabled in response to the call for submissions was then presented. Among these were submissions made on behalf of the Black Lawyers Association (BLA) and the Association of Black Accountants of South Africa (ABASA). Also presented were submissions by the Media Review Network (MRN) and individual submissions by, among others, Mr Colin Mashile and Mrs Ursula Bruce. The Commission then heard evidence from newspaper editors from virtually all the newspaper houses in South Africa.

In this section we analyse the evidence presented before the panel. This section will concentrate on the evidence of the principal ‘complainant’, BLA/ABASA and then give the responses of the editors. The Commission is conscious of the fact that there were no formal complaints as such before it. Instead, the Commission invited submissions that should not be considered in the same manner as complaints before the Commission. The investigation was, therefore, issue-driven rather than instigated by the submission of a complaint. Nevertheless and for purposes of better understanding of the issues, we analyse the evidence not on a chronological basis but thematically. For that reason, we defer consideration of the substantive research material and responses thereto to the section on social analysis of racism. The legal and constitutional arguments will be examined in a separate section. Here we present only evidence that gives the basis for the investigation.

We have divided the evidence into the following themes:

- General Statement of Submissions;
- The History and Self-understanding of the news media;
- The Dynamics and Situation in the Newsroom/Editorial Offices;
- The Relationship of the News media with its Publics:
  - owners or publishers

- readers and clients
- the advertising industry
- regulating and complaints machinery;
- Response to specific allegations of racism.

The Commission wishes to place on record its appreciation of the manner in which all the evidence was presented. It must have taken great care to prepare and the actual presentations were done courteously and due respect was given to the process underway. Even where objections were raised this was done with proper accord to the honour of the presiding officers at the inquiry. There were occasions of fierce debate and contradictions. Despite the strong feelings about some of the issues there were also many light-hearted moments where the humanity of the occasion and the participants was recognised. That too was most commendable.

Second, it must also be noted that the Commission was anxious that the hearings should not be stifled by over-formalism. All testimony was heard under oath or under affirmation, except in one case where the witness requested to be excused in order to make him free to tell the truth! By agreement there was to be no formal cross-examination. That was done in order to limit the adversarial environment of the proceedings. We are satisfied that the rules of natural justice and procedural fairness were observed and no undue prejudice against anyone was allowed to stand without proper recourse. There may be one instance where that might have slipped through and that is being investigated by the Commission separately from this process.

Finally, let it be noted that we are presenting this evidence without comment or evaluation. It is not necessary for us to pass judgement on the accuracy or otherwise of the testimony presented to us. Fortunately, there was a large measure of acceptance of the evidence presented. Where a different perspective was offered or particular evidence challenged we shall draw attention to such. On the whole it is our intention to allow the evidence to stand on its own.

## **THE SUBMISSIONS**

Drawing from the submissions of a group of black editors, Kaiser Nyatumba of the Durban Daily News, Mike Siluma of Sowetan, Phil Molefe of SABC, Cyril Madlala of Independent on Saturday in Durban, and Charles Mogale of Sowetan Sunday World, including that of the BLA/ABASA, the Media Review network and Prof KK Prah of the University of the Western Cape, the substance of the complaints fall into the following categories:

- transformation and media diversity: The point is made that South Africa's media continues to be controlled by white people and caters for white interests and reflects the world view of the white minority. The pace of change and transformation has been very slow. The

country's publications are grossly unrepresentative of the population. There are very few black people in positions of authority, which leads to an inadequate representation of the South African story.

- Racism: that there is racism in the media and this causes hurt and pain to the majority of black people in the country. News reports and opinion columns constantly create the impression that all blacks are corrupt and incompetent. There is differentiation in the manner in which blacks are treated in comparison to whites. Mr Halle Qangule, speaking on behalf of BLA/ABASA noted that “if a newspaper is making a point about corruption being perpetrated by black people then it is no longer a corruption story. It cannot be corruption story...” Besides the stereotyping of African people as corrupt or incompetent, the Media Review Network complained that Islam was represented as being terrorist. It is suggested that newspapers use racial stereotypes routinely without regard to the hurt this caused to the esteem and dignity of black people. To the suggestion that there was no racism in the media but sloppy journalism, Mr Qangule doubted the credibility of such a charge because white editors constantly espouse the integrity of their craft and the quality of the experience they have. It did not make sense then that when it comes to racism, quality journalism escapes them. Prof Prah charged that a newspaper used a false letter to discredit the idea of the African Renaissance. When he questioned the authenticity of the letter, his protests were not taken seriously. His letter of rebuttal was turned down because of length. Reference was also made to refusals by editors to publish corrections or the viewpoint of black intellectuals to rebut views already published in the newspapers.

- Representativeness: the impression gets created that white spokespersons represent all or reflect the views acceptable to the majority. Generally views that are sought or quoted are those of white experts. As a result white editors and experts continue to set the public agenda.
- Referring to the challenges facing black editors in an environment where white cultural approaches prevailed, Mr Mike Siluma, Editor of Sowetan speaking on behalf of the five black editors had this to say:

I think we need to understand that as a black editor or in particular as an African editor, you can either be assimilated and become part of the whole system or you can try to introduce that diversity and bring into play your own thing, your own experience and try to introduce that into the mainstream but that is a difficult thing because if you play along you will be fine<sup>10</sup>

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<sup>10</sup> In a written refutation of the position of the black editors, Brian Pottinger, publisher of the Sunday Times, noted that a fair coverage of the 3,6m newspapers sold daily in South Africa were either produced by black edited media outlets or by black-owned or partially

## HISTORY AND SELF-UNDERSTANDING OF THE NEWS MEDIA

South Africa's current media institutions are rich in history and in many ways reflect the history of South Africa. Afrikaans newspapers come from the history of the struggle of the Afrikaners against English hegemony. They seek to preserve the Afrikaans culture and language asserting the legitimate place of Afrikaans in shaping South Africa. They were previously associated with the political fortunes of the white Afrikaner minority ruling clique in the country. Indeed, they were founded to express the political aspirations of the Afrikaners in South Africa. These publications have evolved to different degrees from that history. With mergers and closures, the Afrikaans newspapers have consolidated into the National Media Ltd stable, which includes some English publications, the most prominent of which is City Press. The National Media Ltd conglomerate has diversified its media and communications interests.<sup>11</sup>

Then we have South Africa's English newspapers. These have undergone some changes in the period since the end of the National Party rule. A major new owner is the Independent Group, which bought the Argus Group and owns titles in the major metropolitan areas of the country. Dailies like The Star and the Sunday Independent are flagship publications of the Independent Group. Next is the Times Media Ltd with the mass circulation Sunday Times in its stable and financial journals like the Business Day and Financial Mail. TML also has provincial newspapers like the Evening Post and Eastern Province Herald in Port Elizabeth. South Africa's traditional English newspapers have always espoused liberal values, affirmed the value of the freedom of the press, were critical of the apartheid regime and, to various degrees, supported opposition parties during the *apartheid* era. Johnnic Ltd, the investment company with majority black shareholding acquired TML in 1996. It has been suggested that by this fact, TML is a majority black-owned company.

To this must be added The Citizen, a Johannesburg daily owned by Caxton Publishers. This is a newspaper founded as a front by a previous National Party government in order to compete with the Rand Daily Mail. It has since

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black-owned publishing houses. He argues that at the end of the day, it is the "reach and penetration of newspapers that constitutes their influence."

<sup>11</sup> Brian Pottinger has provided the panel with the following statistics drawn from ABC figures:

Ownership:  
Black-owned.....31%  
Foreign-owned.....27%  
Afrikaans-owned.....32%  
White English-speaking owned.....10%  
Editorship:  
White: 51%  
Black: 49%

been bought by Caxton Ltd who also own a number of local broadsheets across the country. The nation's largest daily circulation newspaper is Sowetan, which is now part of the NAIL group. Its sister paper is the baby of the pack Sowetan Sunday World. Among the independent newspapers are Mail & Guardian, the Daily Dispatch and the Zulu weekly Ilanga, the only newspaper in the country to publish in an indigenous language.

Besides the print media, South Africa has a rich blend of electronic media, especially radio and television. The SABC is the state broadcaster. It is statutorily regulated with a board of governors. The SABC broadcasts through radio and television in most of the languages spoken in South Africa. Midi Television, broadcasts as e.TV, an independent television station that broadcasts free-to-air. With the deregulation of the airwaves local radio stations have been established across the country under local control and participation. There is also the satellite channel, M-Net which attracts a large number of viewers, specialising in entertainment.

In evidence before us, the various media outlets defined themselves differently. Different units or divisions of the National Media Ltd (formerly Naspers) group testified. These were Die Beeld, a Johannesburg daily led by the Editor, Mr Arrie Roussouw, Die Burger, the Cape Town daily and the oldest publication in the stable, led by the Editor Mr E Dommissie, the Rapport City Press (RCP) which includes the English and Afrikaans Sunday papers, City Press edited by Khulu Sibiyana and Rapport, Johann de Wet. Testimony was also given by Mr van Wyk, editor of Huisgenoot and YOU monthly magazines. The Group brought together the editorial team which had both black and white as well as senior women editorial staff.

In testimony before us the Naspers Group recalled that their group was founded in 1915 as an Afrikaans empowerment company. Mr Roussouw stated that he could understand the concerns expressed by the black editors. When Die Beeld was established in 1974, Afrikaners were confident about power and it was possible for the new publication to express in its pages some of the ferment of ideas then emerging within the Afrikaner community. From the beginning, the paper espoused and developed a 'verligte' political stance within the Afrikaner community, a forum for intellectual debate. It situated itself from the beginning to a South Africa "broader than that of serving the needs of the Afrikaner..." The paper heralded the political changes and welcomed them. In 1997 it published a mission statement which among others, stated

We do not align ourselves to any political party or ideology. We only associate ourselves with the truth and the interests of our readers and we would endeavour to ensure the freedom of the press, a multi-party democracy and human rights as well as economic freedom and a peaceful and prosperous South Africa...

Roussouw also stated that the paper had a firm policy on racism, which is reflected in editorial comment. A great deal of discussion and agonising led to a policy on racism in editorial material, for example, instances where it

would be appropriate to mention the race of a party to a crime story. The paper has also sought to publish material from eminent black personalities in order to give their readers a different viewpoint. Mr Johann de Wet confirmed much of Roussouw's view of the history and social environment in which his paper published. Mr de Wet mentioned that Rapport was mindful of its racial mind-set and sensitive to the pain and hurt caused by racial insensitivity. For that reason the paper welcomes scrutiny. The paper shares the same values as Die Beeld by striving to report news "comprehensively, objectively, accurately and reliably." The paper expresses its own opinion and comment in a fair and balanced way. Mr Eben Dommissie the editor of Die Burger reminded the panel that Die Burger was the oldest and largest Afrikaans daily, established in 1915, a time of great trauma for the Afrikaner. The paper committed itself to the values of a multi-party democracy; a market orientated economy with a social conscience; press freedom and the advancement of Afrikaans and minority rights. Dommissie cautioned against political control. He warned against "the tyranny of the majority."

Mr Philip Van Niekerk, the editor of the Mail & Guardian, gave a history of his paper from the day it was born at the height of the struggle against apartheid. He submitted that from the onset, his paper has always been committed to the elimination of all forms of racism. Their approach was that of being involved in various campaigns like the Release Mandela Campaign and exposing political scandals like the apartheid hit squads and the "Inkatha Gate scandal". He submitted that that background informs their present mission<sup>12</sup>. The newspaper sees itself in present-day South Africa as playing a watchdog role with "hard-hitting investigative journalism and analysis." He described the character of the newspaper in these terms:

We have a particular personality as a newspaper. We are up front, in your face, fiercely independent and critical. We dish it out and we take it. We know our readers are by and large intellectuals, many of them South Africa's political class. Many read us because they love us and others read us because they hate us. The significant thing is that they read us.

The TML group was represented by the editors of the Sunday Times, Business Day, Financial Mail, and the Evening Post.

In his submission on behalf of TML, Cyril Ramaphosa, the Chairman focused on the Sunday Times, the flagship title of the group. He reported that the paper continues to increase its circulation and has done so by 1/3 since 1994. The bulk of its new readers are Africans, the most significant increase in the top two class groups. The paper is attracting a greater black readership. It is, as he puts it, "a newspaper of preference for the country's multi-lingual elites." These statistics must demonstrate that the paper would not be attracting such a growing number of black readers if it was propagating racism. Since 1996 the paper has seen a steep rise in sales. The paper has also increased its coverage of black people and has recruited

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<sup>12</sup> Vol XII 4/5 p534



senior black staff from whom it would be inconceivable to see the advancement of racist material. The new owners of the Sunday Times have continued the tradition of owners and management not to dictate editorial policy. The submission goes on to say

For our part, we are quite content to stand by our record of exposing corruption and criminality in all sectors of the society; of assisting with the growth of a culture of tolerance and debate; of respect for the constitution; of investment in literacy and education... of portrayal of role-models in our society. We are particularly proud of our stance of not being beholden to any political or social party but only to the interests of our readers, the citizens and our constitution.

TML is owned by Johnnic and controlled by the National Empowerment Consortium which is black owned. Mr Shepherd Shenewe, the operations director, mentioned that the company has a responsibility to “support black empowerment.”

The main presenter from the group was Mike Robertson, the editor of the Sunday Times. He mentioned that as a black journalist, he would not have worked for a paper like his 20 years ago when he started in journalism. He would not have liked to be associated with a paper that celebrated the raid on Gaborone, the capital of neighbouring independent and sovereign state of Botswana, with a headline, ‘The Guns of Gaborone’<sup>13</sup>. Since becoming editor two years ago, Robertson undertook some changes to try to turn the paper around among these was to improve the pay and conditions of staff, undertake training programmes and open dialogue among staff about the content, philosophy and direction of the newspaper. His intention was to get the paper to live up to its motto of being a paper for the people.

Robertson acknowledged that as institutionalised racism was part of the fabric of South African society, it would not be surprising if the paper continues to reflect that racism. “All I can hope”, he says, “is that we are doing so in a more intelligent and understanding manner today than we were doing yesterday.” The paper has improved coverage of Africa and the Africa edition is indeed written by Africans. He defended reporting on corruption, because “it is a cancer in our midst and must be rooted out. It does not matter whether the person is black or white. What matters is that they are undermining our democracy and must be stopped.”

Peter Bruce of the Financial Mail, a weekly journal, asserted that one did not publish material that is deliberately harmful or hurtful to others. Any racism that may be detected in the paper could only have been inadvertently. He encouraged anyone who objects to any material in the paper to write and raise objections. “...one of the most powerful things that readers of publications can do is to write letters to the editors...” He would like to know and be given the benefit of the doubt “because I did not set out to be a racist or to write something racist...” Jim Jones, of the Business Day

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<sup>13</sup> The SADF raided the homes of South African exiles in Botswana in 1986, The Sunday Times reported that infamous raid with a banner headline: “The Guns of Gaborone”.

asserted that his was a niche paper for the business oriented reader or politician. It is a paper that exposes the businessman to opportunities in business. The reader profile of the paper is: third black male, third female and third white male. The trend is towards an increase in the black readership. The belief of Jones is that newspapers should have integrity, inform and report truthfully otherwise readers will lose confidence. "Lose that trust and pander to prejudices, you will never have a newspaper..." Asked about coverage that could be said to be racist or contains racial stereotypes, he insisted that journalists couldn't be racists because it would be commercial suicide. He went on to say, "I think the people who work and are involved in the press... are on the whole decent people who are involved with and want to see changes in their society..." While his paper has embarked on a programme of training young journalists, he has to be mindful of the fears and insecurities of whites who have been running the paper for a long time.

If these were the views from the metropolitan centre, what were the views from the other parts of our country? Ms Lakhela Kaunda, a black women editor of the Evening Post in Port Elizabeth attested that newspapers "shape public opinion". For that reason she believes that it is important that as many voices as possible be heard through the pages of her paper. With the new South Africa, black people do not want to be spoken about. They want to speak for themselves. She mentioned some typical stereotypes about youth and crime, she mentioned stereotypes about black people and football and about reportage about the African continent. She conceded that there was racism in the newsroom, where cultural stereotypes prevailed and perceptions make communication difficult. Ms Kaunda also reported on how she managed her newsroom:

Every news conference we debate amongst ourselves how we are going to handle a particular story. I am a very hands-on editor. I look at the stories as they come through for example. I am able to interfere, I am able to stop a story, talk to the reporter and say, this story is unbalanced, can you phone so and so... I provide support to my staff, for example, I feel very strongly about the coverage of violence against women. I always scrutinise stories dealing with violence against women. I provide support to my staff, booklets...

She noted that there were too few women editors in the country. She particularly highlighted the plight of black women journalists who were constantly sidelined. She called for newspapers to "develop the kind of patriotism which one finds in the western media, without losing their independence. Being loyal to a country does not mean loyalty to the government of the day." Under her leadership the paper is being repositioned to be the paper for the changing times. "We are a paper that sees itself not only as a watchdog but also as an instrument of social development."

The Independent Group made a corporate submission and the editors of the various titles gave evidence. In its Mission Statement the Independent

Group states that it “strives for maximum quality in every aspect of all that we do. We are committed to the betterment and success of the democratic South Africa, ever mindful of the injustice of the country’s past.” Editors are issued with a letter of appointment which requires the editor, among other things, to “further the cause of racial cooperation and pursue a balanced policy calculated to enhance the welfare and progress of all sections of the population of your region.” The company has an affirmative action policy and has developed an Employment Equity Plan as required by law. Independent Newspapers is the largest newspaper publisher in South Africa and it is spread throughout all the regions of the country. It has a strong international influence in its management and in its national outlook. The leading daily in the group is the Johannesburg Star. Mr Peter Sullivan, the Editor stated that all staff in his paper are required to understand the bill of rights, especially sensitivity to racism and sexism which was promoted. Authority in the paper is diffuse. There is discussion and participation in decision-making at all levels. “It is my belief,” he testified, “that the decision making at the Star has been pushed down to a level where there are a great many decision-makers instead of simply one, and that is very helpful in ensuring that those rights are maintained and observed as much as possible.” The Independent School of Journalism which provided training of young journalists ceased operations about a year ago due to budgetary constraints.

Ms Paula Fray, the editor of Saturday Star pointed out that upon assuming office she brought with her sensitivity as a woman on gender issues and as a black person sensitivity about race:

And I think racism, the other side of sexism is internalised oppression and it would be very foolish for me to assume that when I walked into Saturday Star as a black woman editor that I did not carry with me a certain way of thinking, a certain way of operating that has been produced from years of believing that I was a female and all this associated baggage that goes with being black and female. ... And so I think for me the greatest challenge is that it is not the number of stories you write of by increasing the number of black faces in the newspaper, it is when the adrenaline rush goes through you at a story that you have not been trained to get excited about, when you begin to see news through different eyes.

The challenge for a black editor is to change the way he/she perceives news. Her style is enabling and she has sought to create a good working and co-operative working environment among the small staff dedicated to her weekly publication. She gave an insight into her style when she said that it was not so much what we write about gender but how stories about gender are handled. Her view is that

...when we practice good journalism, when we practice honest accurate journalism, when we strive for good journalism, that certainly those three work together rather than against each other.

Broadly speaking, this outlook of the practice of journalism is shared by all the editors of the Independent Group. It is important to spend time reflecting

on the approach of Ms Fray because she is a black woman editor and it was interesting to discover how her sense of identity was reflected in how she went about her business.

John Battersby confessed that he was conscious that his entire process of socialisation meant that he had internalised a value system that was racist and to that extent he was 'racist'. His personal development had to be seen against the backdrop of a racialised social system. However, he has had to learn to 'unbecome being a racist' and he has not got there yet. He gave an example of the dilemmas a journalist has to face. He sent two journalists to Ventersdorp to cover the situation in the town following the committal to jail of Eugene Terreblanche, the leader of the AWB. He reports that the journalists, one black and another white, came back traumatised by the experience. He had to publish their story which contained some racially offensive material. He took the decision to publish it as it was because

we have to convey to our readers in that language...that while we sit and talk about problems of racism, around the country and I am sure Ventersdorp is not unique, people are using in open places like pubs and bars, ...extremely offensive language about people of other races..."

Christ Whitfield, acting Editor of the Cape Argus provided an interesting insight into the culture of a newspaper. He points to the paper's traditions and practices which have been refined and continue to be developed out of experience and practice. "These traditions and practices," he says, "are forged under pressure of daily and even hourly deadlines and are constantly being adjusted and reshaped as the newspaper moves along the path chosen by its editor." In his paper through debate and discussion, they have had to deal with reporting on race. They have become conscious of the use of coded, stereotypical language, and the use of patronising, de-personalising and de-humanising expressions. The paper has consciously sought to expose all forms of racism even though he would concede that some racist material would find expression in the newspaper. They have found it best to deal with it by discussion at editorial meetings and by constructing the language of preference for the newspaper which journalists are expected to adhere to. Peter Davies of the Sunday Tribune was made aware by a group of his African friends that his paper did not cater for its African readers in terms of its news coverage. The paper had a five-year strategic plan which had to be revised in the light of these observations. Policy and practice in the paper emerges from vigorous discussion in the newsroom. During such discussions, reporters critique the paper and make proposals on how copy could improve so that it reaches the target market.

Moegsien Williams, the former editor of Argus who recently became Executive Editor, drew attention to the problems of staff recruitment and skills shortage among black journalists. This has meant that it has not been easy to make good the commitment to affirmative action and placing competent and deserving black people in appropriate management positions. John Scott of the Cape Times reported on how a newspaper that had considered itself anti-apartheid and a bastion of liberal values for years,

never had a policy of employing black journalists in any great number until the 1990s. The paper has only recently become conscious of the phenomenon of racial stereotypes. It has become more conscious of racism and has had to deal with racial tension in its own newsroom. The paper has undertaken a number of initiatives to highlight the political and social changes South Africa was undergoing. Among them was a series “True Colours” and “One City Many Cultures’ project.

Conscious of the hierarchical levels in a newspaper, various editors spoke about their attempts to bring in more journalists into editorial conferences. This was necessary in order to hear the voices of women and black staff who might be excluded in a hierarchical system. Williams made reference to his efforts at flattening the management structure and allowing greater participation in management decisions.

Sowetan editor, Mike Siluma presented on his paper, the largest circulation daily in the country. He stated that the policy of the paper was “independence, fairness and a need at all times to take the broader interests of South Africa into account.” Regarding racism, Siluma told the panel that for Sowetan racism had to be exposed and its journalists investigate and campaign against abuses of power and racist actions against black people. Mike Siluma also spoke about the culture and traditions of Sowetan. For example, as a paper that serves the poor people of our country, its readers view the newspaper not just as a read but “like an advice office.. where you go for information and to complain... and to ask for help...”

Tim du Plessis of The Citizen, a Johannesburg daily which had been started to prop up the apartheid system said that the paper was now committed to change. The paper has a set of guidelines for reporting on race, the avoidance of racial stereotyping and/or racism. For example, not to mention the race of people unless it was essential to make the story convey meaning. He drew attention to the fact that the power and influence of the media was rather limited. Its scope was to disseminate information and ideas. For a newspaper, for example, to set itself up as, say, an opposition newspaper because opposition is weak, would be to diminish the role of the newspaper. For him racial stereotyping and insensitivity was simply bad journalism. For du Plessis, the dilemma and challenges journalists face in a changing environment is “the ability to balance paradoxes, to manage them simultaneously.”

For radio and television, the Commission received submissions from the SABC, Midi Television, community radio stations, Radio Pretoria, Kaya FM and Radio 786.

The SABC is the public broadcaster. The corporation is therefore mindful of its public function. The corporation has evolved from being a state-controlled broadcaster to one whose powers and functions are now regulated by statute. The SABC embraces constitutional principles and promotes diversity and representivity. The new SABC, therefore, had to undergo extensive transformation in order to reflect the new ethos of the new

constitutional regime. The transformation programme included: restructuring the human resource profile, managing diversity, providing training and restructuring the contents of news production. The submission noted that there were internal struggles about racism within the corporation. There were racially motivated tensions which in part had to do with insecurities, the implementation of affirmative action and cultural diversity. The corporation is conscious of the need to reduce the marginalisation of black media professionals to ensure more equitable representation in the newsroom. The corporation seeks to give voice to all the people of our country. The news and current affairs division aims to produce news that represents fairly the people of this country, government, the ruling party and opposition parties. It also seeks to cover racial incidents “without bias and sensation.”

Mr Phil Molefe, Executive Editor, making the presentation on behalf of the SABC noted that the SABC was conscious of its role of reflecting South African society in all its complexities; it has also improved coverage of the Continent. The corporation still has to contend with programming that is not truly reflective of the country or of the African continent. In order to give effect to the broadcasting vision set by the Board, the SABC recognises that there is a need to improve technical broadcasting skills for the previously marginalised if the culture and programme content of the SABC is to improve. The Corporation has developed internship programmes and training to meet this need. In order to make expertise from black South Africans more visible, the Corporation has a database now of black commentators with skills in political, financial and economic commentary. Mr Molefe expressed concern about the attitude of advertisers. There continued to be disparity in advertising revenue which means that different stations within the SABC have more resources than others.

It is worth a pause to listen to the story of Midi Television, proprietors of e. TV, the only private free-to-air television station in South Africa that went on air in 1999. The main presenter was Quresh Patel, the Channel Director of e. TV. Mr Patel made mention of the qualities of good journalism and the best guarantor of media freedom. He went on to say

Our view is that bad journalism is often mistaken for racism. It is almost as though it is an incident of bad journalism that we have racism...This view does not ignore racial stereotyping. It does not suggest that the attitudes of both black and white journalists always contribute to racial harmony or that the media often and without malicious intent demonstrate racism in the manner in which whites or blacks are portrayed but we argue that bad journalism is the target and it is bad journalism that contributes to racism in the media.

Excellence in journalism can, he believes, reduce or limit the incidence of racism in the media. Patel holds that stereotypes are being challenged in the newsrooms today thanks to the efforts of a band of black journalists and managers who are using their power and influence to change the face of the media in South Africa.

## **SITUATION AND DYNAMICS IN THE NEWSROOM**

Newsrooms and editorial offices in South African newspapers have had to deal with a culture shock. Not only did they have to contend with the social and political changes in the country but that change imposed itself in the newsrooms and editorial offices. Not only were there changes in the ownership structures in the newspapers which at times brought in international, multi-national conglomerates but also black empowerment, politically assertive new owners and publishers. So, newspapers had to serve a wider variety of interests. Commercial realities meant that newspapers could no longer simply be tools for mere ideological advancement but commercial operations. During this sea of change new winds were also blowing. Newspapers had to be run along modern management lines. By and large the personalities in the newspapers had not changed. It was the same white oligarchy who managed the news. They had the technical skills as sub-editors; they were in charge of news operations and in many cases continued to manage editorial content. But almost all of them recognised that the changing situation required new understandings and a new quality of relationships. Many welcomed the changes and sincerely believed that the new situation meant that the ideals they always believed in could find better expression under the new social and commercial arrangements.

All the news media recognised that they had to situate themselves afresh in the market. They had to attract new largely black and women readers and viewers/listeners. The advertising industry was also changing. They had to appeal to a different taste and appeal to a different market. And so it was that a new crop of black editors was appointed since the 1990s. A growing number of black journalists joined newspapers which previously only paid lip service to equality and democracy. The traditional hierarchical arrangements in the editorial offices had to be reconsidered and structures had to be reconfigured. All testified that of necessity editorial conferences had to be more inclusive. Management styles had to take account of a different cultural mix of staff. It had to be more open and consultative. Debate and discussion became the rule rather than a dictatorship. At the same time, the editor retained authority even though the new labour relations circumscribed this too. Editors and management had to operate within a new rights based environment. They all had to learn and understand the new Constitution and Bill of Rights. They had to get used to a new political elite. A new management culture of strategic planning and mission statements and visions had to be developed. It had to represent the shared vision of the institution.

The first and obvious thing to note about this is that it caused fear and insecurity, especially to those who felt threatened by the new arrangements. Affirmative action was threatening to some white journalists who realised

that their jobs were at stake. They resisted or were indifferent. Jim Jones told the story of one of his senior journalists who ended up leaving rather than take on the responsibility of training and mentoring a young black journalist. The SABC has had to contend with obstruction of its plans at middle management level. Many of the new inflow of black staff had to get used to dealing with others on the basis of quality. Others were assertive and were aware of the political significance of these new arrangements. Either way, managers had to work at building relationships. All the editors reported that news conferences were marked by rigorous debate and discussion and that all views had to be taken into account. That is why the Cape Times reported the onset of racial tensions and animosity in their newsroom. There was a lively awareness that with the new inflow of women and black journalists, mostly at junior level and the absence of such at senior levels meant that the social arrangements had to change. News conferences had to be more inclusive because there was an understanding that otherwise some significant voices and approaches would be missed out. A new way of reporting on the African situation was also demanded. Ms Kaunda attested to the fact that she was a hands-on editor. She was demanding of her journalists and expected sensitivity and applied the rigorous standards of information and communication. Debate about news content, cultural sensitivity can be expected. Gender and race sensitivity was at times required. Tim du Plessis stated that often it was a case of having to manage dilemmas between maximum information and media freedom and cultural, race or gender sensitivity also had to be considered.

There were, of course, critical voices about the situation and controls in the newsrooms and editorial offices. It was suggested that there was still too much white control in South African news media. It was noted that the absence of adequate technical skills, like sub-editing among black journalists, affected what came out of the pages of newspapers for instance. Editors stated that there was no deliberate attempt to be racist or to publish racist material. Racist material or racial stereotypes would slip through under pressure of deadlines or because the mechanisms of the editorial meetings failed to detect them.

In his written submission, Mr Mashile recommended that “the only way we are going to correct the situation in terms of the images that are coming out of the mass media is that we have to change some of the people who are making those images. If the situation is not rectified, we will continue to have confrontations between the races. The Human Rights Commission should support the GCIS call for media diversity. This encourages diversity in the news-room reporters and encourages that more blacks need to be in the decision making positions in the media”<sup>14</sup>.

While acknowledging the need to make their newsrooms more representative, some editors felt hamstrung by the unavailability of

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<sup>14</sup> VOL II p73



resources which are necessary to realise these noble goals. Mr Kaiser Nyatumba of the Daily News, submitted that “very severe cost cutting” measures limit his ability and the extent to which he could make sure that his news-room was representative<sup>15</sup>. He argues, “you only have so many positions, you would have to wait until a vacancy exits when you fill it then and you want to make sure that suddenly the representative things get addressed and I feel very strongly about it as a person”.<sup>16</sup>

In both her oral and written evidence, Paula Fray of the Saturday Star, confirmed that insufficient finances was a major constraint in maximising transformation in the news-rooms. She submitted further that while she wished to have a black senior-investigating journalist in her paper, the budget constraints and capacity of the news-room did not allow for this kind of practical transformation.

Arrie Roussouw acknowledged the fact that given their historical background at Beeld, they “still have a long way to go”. In addressing the issue of diversity, he emphasised that they have committed themselves to affirmative action despite the language barriers<sup>17</sup>.

Nomavenda Mathiane, a journalist at Business Day volunteered to give evidence because she was concerned about the gender imbalance in representations on the media. She wanted to alert the panel to the difficulties faced by women, especially black women, in the media industry. Having worked in almost all the newspapers based in Gauteng since 1974, Ms Mathiane was the most experienced black journalist to appear before the panel. Given that background her presentation represented the voice of the most of the black women journalists. She confirmed this contention by submitting that African women journalists were very lonely in the media business. She invited the panel to look at the following observations:

- That there are very few black women in the media industry especially the electronic media and in senior positions in the industry in general.
- That the media rarely solicited the views of black Women academics and members of parliament except where they appeared as victims telling stories of how they had been raped assaulted or abused.
- That the media industry was structured in such a way that it was very difficult for black women to gain entry.

In responding to the question of what impact the absence of black woman has on the products of the media, Ms Mathiane submitted that there were those stories that could be understood best when told by a black women and therefore the absence of black women denies the reader an opportunity to hear or know about such stories. She went further to challenge black male editors for doing less than enough to remedy the situation. She invited the Commission to treat the plight of black women journalists as a priority. Jim Jones of the Business Day recalled the days at Business Day when the

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<sup>15</sup> VOL XII 2/5 241

<sup>16</sup> VOL XII 2/5 244

<sup>17</sup> VOL XII 4/5 437

authority of the editor was unchallenged. Those days the paper was made up exclusively of white males and there was no culture of debate and challenge. He submits that his paper had changed complexion over the years and had now “blackened considerably”.

The submission by a group of black editors raised sharply the issue of transformation. They contended that at the heart of transformation of the media in South Africa is the control and ownership thereof. They supported this contention by submitting further “the establishment of a new non-racial South Africa implied the dismantling of the exclusive control of our white compatriots over the levels of power at every level including the media”. In this regard, the editors gave an example that the majority of top editors are white”.<sup>18</sup> The editors also voiced their concern at the perception that has been created in various newsrooms that white people do not want to hear or know about what is happening in the townships and vice versa; a situation which leaves us with two worlds in one newsroom.

Ms Kaunda raised serious concerns about the lack of diversity in the newsrooms. She warned that it must not be thought that there are no racial divisions in the newsrooms throughout the country. She argued that the past experiences of both black and white journalists inform their current perceptions about each other. She painted a picture of complete lack of trust between black and white media workers. Blacks are accused of being untrustworthy because they come with a pro-struggle background and are therefore overlooked for promotions; that they are a threat to the jobs of whites; that whites are automatically perceived to be unable to handle black stories and that white editors are put under pressure to tow the government’s line, thereby compromising their freedom of expression. Ms Kaunda concurred with Ms Mathiane in her contention that women suffered the worst forms of racism in the newsrooms.

She pointed out that this state of affairs needed to be changed and suggested that the starting point was to encourage interaction amongst media workers. It was her belief that this hard earned democracy needed to be nurtured by all; that people should learn to appreciate that “we now live in a democratic state with a black-led government and that despite this our fears of threats to freedom of expression are actually unfounded given the kind of Constitution we have”. She listed the following recommendations as the starting point in transforming the South African media:

- That since the future of the media depends on the majority, it is only fair that the voice of the majority should be heard
- That journalists must interact amongst themselves
- That there must be more diversity training
- That there must be openness among media workers

John Battersby of the Sunday Independent acknowledged that efforts have been made to address racial issues in the newsrooms. He pointed out

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<sup>18</sup> VOL XII 2/5 257

however that it was difficult to recognise what results these efforts have yielded in terms of integration and change of attitudes. He pointed out that building a common experience that stakes out a common identity for South Africa and all South Africans in the post 1994s is an endeavour that needs to be nurtured.

The SABC recognised the need for representivity in the newsroom as an assurance against racial stereotyping and bringing in a diversity of voices and faces to report the South African message. The public broadcaster has brought in more black commentators into the newsroom. To achieve this it is building a database of black experts and professionals who can be called upon to comment or provide expert opinions when necessary.

The *Mail & Guardian's* comment on the issue of media diversity was that the real evil lying behind our present predicament was the system of Bantu Education. Mr Van Niekerk suggested that in order to improve the quality of journalism, the processes of democratisation and transformation of the media should be linked.

## **RELATIONSHIPS WITH THE PUBLICS**

At the heart of every media institution lies the interests of its owners, readers, advertisers and to some extent, non-readers. In a way, the media has a direct or indirect influence on the public at large. It is therefore important to look at how these media institutions relate to their various interest groups. In the words of Mr Mashile “The media truly has an impact on how people develop their understanding of and attitudes towards people of other nationalities and cultures. It is the same media that tells us about the world before we see it. It lets us imagine things before we experience them.”<sup>19</sup>.

## **COMMERCIAL INTERESTS**

It was pointed out to the panel that media institutions are first and foremost business institutions. Money has been invested and the shareholders of the companies expect dividends. The editors have to be sensitive to this fact otherwise the newspaper will not survive. Even before that, the proprietors will remove him or her. To take account of that, many newspapers have become mammoth business institutions with several layers of management like operations managers, general managers and so forth overseeing the commercial interests of the business. The editor has to have an interactive relationship with this because survival depends on it.

We have viewed the commercial and business interests of the media as a public interest because although intrinsically part of the media institution, it functions in a different paradigm. Indeed, publishers and owners of newspapers stated that the tradition in South Africa was to grant the editor maximum autonomy in all editorial decisions and management of the news.

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<sup>19</sup> Collin Mashile Vol II p 69

In fact, it is understood that the editors in the TML group of newspapers demanded and received assurances that, upon the assumption of control of Johnnic by the Black Empowerment Consortium, they would be assured editorial independence. Khulu Sibiyi of the RCP Media company within Naspers, confirmed that although his paper was black controlled it was not black owned. Nonetheless, editorial independence was guaranteed and no interference in his editorial management was exercised. All the editors confirmed that they were operating under resource constraints. Their training budgets were cut; they could not bring in black trainees or extranumeraries in order to diversify. Both Jim Jones and Tim du Plessis mentioned the fact that editors realised that the paper had to be a commercial success. It had to attract more readers and increase its advertising revenue. To do that it had to be run like a business, it had to be marketed.

The media have niche markets. They are seeking to extend or go beyond these without losing their current readers. We previously had a situation where Rand mining interests controlled the Argus Group even though the papers were not making profit, only so that they did not fall into the hands of those supporting the apartheid government. In other words, there was merely a control mechanism without any significant investment going into the newspapers. As a result the papers were used as a tool to protect South African English economic and political interests. That was the reason that Tony Heard at the Cape Times, Donald Woods at the Daily Dispatch were treated the way they were by South African newspaper houses. Tony Heard was sacked after he published an interview with Oliver Tambo and Donald Woods did not receive the support he expected from his proprietors after he was banned and forced into exile. In Donald Woods' case that was in spite of the fact that the paper increased circulation when he began to reflect the diversity of black political interests in the Eastern Cape. That also explained the demise of the Rand Daily Mail.

It was explained to the panel that one of the vital considerations in the production of a news institution is its ability to attract advertisement revenue. The Five Black editors noted that the Advertising Industry is another silent but very important role player. They argued that this industry wields a lot of power and influence on the products of the media. They submitted that it is unfortunate that even though they, as editors, are committed to social development, at the end of the day, the media industry is all about business and its future is based on how it survives in business terms.

It was explained that the paper needed to sell more copy in order to increase its AMPS rating and therefore to attract advertisements. It was also explained that some 50% of the available copy in a newspaper has to be devoted to advertisements in order to make a healthy return. We were also informed that advertising agencies determined where they placed their adverts according to their research which showed the class category of the

readers of the papers or the listeners or viewers of radio and tv. The Citizen, it was revealed would not expect that advertising space would be taken for products considered to be beyond the reach of its niche market. On addressing himself on the fact that there are other factors that control the products and the growth of the media Khulu Sibiyana submitted that while we should strive to sell to as many people across the colour line, we should be mindful of the “great divide between the races of this country”. He conceded that this had its disadvantages as advertisers still operated from a particular mindset and chose to ignore the emerging publications.

This logic however begins to break down if it is taken into account that adverts on SAFM and Ukhozi FM, two leading SABC Radio stations, are vastly disproportionate, considering the sizes of their listeners. SAFM is the English radio station which attracts a certain category of listeners and Ukhozi FM is the Zulu radio station with some 5m listeners. Because advertising agencies continue to operate on the basis that black listeners belong to the lower class categories Ukhozi FM Radio does not attract advertising revenue worthy of its size. Sowetan made the same point very forcefully. It was noted the paper was the largest circulation daily in South Africa and that its class index spanned a wider spectrum than other papers. Nonetheless, the paper was struggling to attract advertising revenue worthy of its size.

It is believed that advertising agencies operate on the basis of historic links, jobs-for-pals, ignorance of the market or out of sheer prejudice. The effect is that this prejudices media institutions that have a large black market or undermines the authority of black editors or business managers who may not have the right contacts in the industry.

Calling on the Commission to broaden its investigation to racism in the advertising industry, Phil Molefe made the link between the advertising industry and the media industry. He said that the media industry mirrored the belief of advertisers that white listeners and white viewers have the strongest spending power in the country. He went on to say that not only were these imbalances between channels and radio stations perceived to have black or white audiences fostered but encouraged by the advertising patterns.

The question that was not answered satisfactorily was whether all these considerations which must bear upon editorial management in any way affected the choices that editors made about their products. Nobody would admit to the fact that this had any influence on the way the newspapers, for instance carried out their business.

## **CLIENTS**

It was common cause among media institutions that every institution has its target. Media institutions are by nature competitive. They compete to attract the greatest number of readers, listeners and viewers. The only limitation to that becomes the language of communication. Afrikaans papers are limited

in their readership to those who read and understand Afrikaans. They too may be competing with the English papers insofar as many white and coloured South Africans are bi-lingual. With the dearth of newspapers that publish in vernacular African languages, English papers have less of that kind of competition. Their limitation may therefore be on the basis of content. A business newspaper like Business Day for example, is not publishing for the panel beater in Soweto. Sunday Times makes the point that not only does the paper have some of the best African journalists the nations can boast of, its readership is also increasingly the black elite who are rising in prosperity. That explains, we are told, why the paper has been increasing its circulation within that market dramatically since 1996. For that reason, it was not possible for the paper to be insensitive to the situation of black people in the country for to do so would be suicidal.

An approach to the reading or listening clients was both inclusive and exclusive. Jim Jones for example was very clear that his niche group was the business-oriented person or politician. He submitted further that when he reports about Africa or about the US, his aim is to tell his readers about how to do business there not about anything else. This approach naturally excluded a large part of society and could be communicating that community to itself. Indeed Jim Jones did not exclude that possibility. The approach of the Afrikaans daily Beeld was different. It submitted that it had an Afrikaans speaking market and needed to develop and sell a product for that market. The implication was not that it would have to play to their fears and feelings –rather it was an audience it was able to relate to, to communicate with and to educate. What the paper attempted to do was to bring the world to that community or to make that community aware of the rest of the world.

Khulu Sibiyi agreed that his paper also has a niche market but indicated that it was his intention to venture into other markets and that he sees his paper as a best seller in three years time. On the issue of publications having specific target groups, Mr Sibiyi argued that he does not expect that overnight a person in Soweto would want to buy the Business Day much as he does not expect a person somewhere in Brits to run around wanting to buy City Press. He however believes that the ideal situation is to sell papers across the colour line especially given our historical divide between races which has resulted in many white people not knowing what is happening in Black areas.

Eben Dommissie of Die Burger submitted that the Burger's readership was 53% black (mainly Coloured) and 46% White. He proudly said that its niche market was the Afrikaans speaking community of the Western Cape and that it had increased its circulation by 43% in the last ten years. He emphasised that in a society such as ours, his paper treated race with extreme circumspection. He said that he had developed greater sensitivity to reporting on issues relevant to and affecting race. Pursuant to that, their readership amongst the Coloured community had increased and he

attributed this to the recruitment of more Coloured staff, greater sensitivity and coverage of issues relevant to Coloured people. Die Burger had changed in character over the years and the principal change was that it had become more sensitive to the “ people who are not White”.

Speaking about his relationship with his readership Johan de Wet of Rapport, pointed out that his paper was mindful at all times of its objective of reporting comprehensively, objectively, accurately and reliably. It sought to conserve and promote Afrikaans but supported no political party or ideology. Instead it acknowledged the democratic values of dignity, equality and freedom and was convinced it had a positive role to play in advancing such values.

Peter Bruce who had consistently been supportive of the need to deal with the issue of racism in the media attempted to contextualise the problem of racism in the media in relation to the way reporting was perceived by people who are hurt by things said in the reports. He went on to suggest that an editor only became responsible once it was brought to his or her attention what the impact or consequence of a report was. He said that readers are responsible for their own feelings. However he pointed out that he believes that the editor is responsible for the way that he reacts “to reader’s feelings once they are made known to him”.

The SABC submitted that it constantly monitors the feelings of its listeners through conducting research. They told the panel that their latest research reveals that people are more interested in news about South Africa and on the continent of Africa. The research furthered showed that people are keen that at least every night there should be a few stories that profile the rest of Africa. The SABC however, is very cautious about not compartmentalising news.

Arrie Rossouw of Beeld brought to the attention of the panel that while his readers came mainly from White Afrikaans speaking communities, he was aware that black South Africans were increasingly playing an influential role in all matters affecting the country. The paper saw it as necessary thus to position itself from a social, political and business point of view so that it gave its readers the most accurate, sensitive and balanced information and commentary. In this context it has sought to transform its own workrooms in order to properly reflect and communicate the new South Africa. Black journalists had been recruited. He cautioned that progress has been made but there was still a long way to go.

#### **REGULATING AND MONITORING BODIES**

South Africa has a number of bodies which regulate the mass media industry. The formerly Independent Broadcasting Authority (now the Independent Communications Authority of South Africa) was provided for by Chapter 9 of the Constitution to regulate the broadcasting industry. The enabling statute requires that the IBA should

Promote the provision of a diverse range of sound and television broadcasting services on a national, regional and local level which, when viewed collectively, cater for all language and cultural groups and provide entertainment, education and information.

The IBA has sought to promote diversity and ensures cultural representation. In his submission, Mandla Langa, Chairperson of IBA said that the diversity project aimed to create an environment in which different views can be exchanged and a respect for human rights flourish.” Langa informed the panel that when the IBA Code of Conduct was drafted in 1998, the Authority seriously considered the advisability of including clauses on racism and sexism but decided against taking such a step. It balked at the idea because it feared that might stifle freedom of expression and limit artistic creativity. While acknowledging that the right to freedom of expression like all rights was not absolute, it held that it was the appropriate role of the courts to determine the matter when disputes arose. The IBA therefore took the view that the constitutional clauses on hate speech were sufficient protection against racism.

Regarding racist speech by Radio Pretoria which falls short of unprotected hate speech as in s. 16(2) of the Constitution; it would appear that the IBA has no means of restraining a broadcaster. Nonetheless, the IBA reported that there was a matter pending against Radio Pretoria which *sub judice* rules precluded it from discussing with the panel. On the other hand, Radio Pretoria asserted that they fulfilled all their licence requirements as monitored by the IBA.

The National Association of Broadcasters established the Broadcasting Complaints Commission as an industry based and funded monitoring body which receives complaints from the public about broadcasting material. Its limitation is in the sense that, as a voluntary mechanism, for example, Radio Pretoria does not subscribe to the Broadcasting Complaints Commission because it alleged that it could not afford the fee. The BCCSA adjudicates complaints from the public against any broadcast material. Broadcasters are required to advise their listeners/viewers about the availability of the service. An independent process appoints 14 members of the Commission. The BCCSA may impose a fine or suspend a member if found to have breached the Code of Conduct. The Code of Conduct makes no reference to the prohibition of racism as such, it prohibits broadcasting of material which is

... offensive to religious convictions or feelings of a section of the population, which is likely to harm relations between sections of the population, or which is likely to prejudice the safety of the state or the public order.

It does not appear that the BCCSA has received or adjudicated any complaints on racism during the five years of its existence.

The Press Ombudsman is also a voluntary, industry-based and funded mechanism to receive complaints from the public about material published in the print media. The Press Ombudsman, currently Mr E H Linington, strangely testified that he had no way of knowing how the problem of



racism was reflected in newspapers because he only read a small number of newspapers and does so “for general interest and not to analyse them.” He felt, however, that the print media tried to avoid racism in their reporting of events and expressed distaste for racism in their opinion columns. Although the Press Code was generally observed, his view was that “publicising racist incidents and opening debate on racialism is healthy and opened people’s minds to the question of racist attitudes and their damaging effect on society...” Quoting with approval a Spanish journalist, he takes the view that it is not the duty of a journalist to promote democracy, any public good or any value in society. It appears that Mr Linington confuses expressions here. He seems to be saying that reporting about race/racism was acceptable rather reporting in a racist manner. He believes by reporting the press makes citizens aware of their surroundings and in that way “make a contribution to a much wider effort at creation of a society free of racism.” The office, established three years ago, receives about 80-100 complaints a year. Members subscribe to a press code, membership is voluntary but once one becomes a member one was bound by the code. The overall impression we formed was that the office was laid back, not very well publicised, takes no proactive action and could be more effective than it is. Mr Linington had no objection to strengthening the press code.

## **RESPONSES TO ALLEGATIONS**

The media institutions present made detailed responses to the allegations on racism and racial stereotyping referred to in the submissions and highlighted in the research studies commissioned by the Commission. We use “allegations” as shorthand. In reality allegations, as such, are contained in the submissions. The research reports suggested certain conclusions from their analyses. We then put these to the publications concerned. In response the Commission received detailed legal arguments to assist the Commission with the understanding of race and racism as well as the legal and constitutional considerations that had to go into any assessment thereof. In addition the editors appeared before the panel and answered questions about their approach to the matters before the Commission.

Perhaps the most comprehensive complaint was that made against the Afrikaans Radio Pretoria. Claudia Braude, in her research, monitored Radio Pretoria and some right-wing Afrikaans newspapers closely. Her point was that while these could be considered extreme in their views and crude in their determination to express them, the rest of the media were more subtle. But the paradigm of racial stereotypes and even racist assumptions lurked under the surface.

Mrs Ursula Bruce is a retired teacher who is bilingual in English and Afrikaans. She is blind and therefore relies on radio a great deal to keep abreast of world affairs. She pointed out that the news commentaries; talk shows and news bulletins were propagandistic and deliberately misleading.

Until a few years ago the radio openly advocated armed resistance by the Afrikaners. The radio accuses the government of fuelling racial hatred and the black government is accused of incompetence.

In their response, Radio Pretoria represented by Ds Mossie van der Berg, the Executive Director of Radio Pretoria contended that the radio could not be accused of anti-semitism. The radio station fulfilled its licence obligations. The station sought to advance the Afrikaner's protestant western cultural heritage and identity. It also advances this community's desire for political freedom and economic self-determination. Finally he argued that the Afrikaner could not be racist in South Africa because the Afrikaner did not have any power. The radio station merely advanced the legitimate interests of the Afrikaner community within the laws of the country.

To the complaint by Agri-South Africa that a particular talk show he hosted propagated racial hatred against white farmers, Jon Qwelane gave an angry response. Agri SA had pointed out that "hate speech with a strong racial undertone directed against farmers as a group is one of the factors that is contributing to the high incidence of attacks on farms and the murder of farmers..." Jon Qwelane denied any allegation of racism or that he propagated racial hatred in his broadcasts. He then went on to accuse the Agri-SA of being racist, of condoning the racist attacks on farm workers and of not taking action against their members guilty of racist violence.

Other editors responded to the submission by BLA/ABASA and the analysis in the research reports of Claudia Braude and MMP.

Apart from the general observation that the media was still owned by the white minority, BLA and ABASA were also very vocal in accusing the Mail & Guardian and the Sunday Times of advancing stereotypes of black professionals as corrupt and incompetent. The basis of their allegation was the differential manner of reporting in cases involving black and white professionals. Substantiating this allegation, they submitted that black corruption cases receive extensive coverage as opposed to their white counterparts in similar circumstances.<sup>20</sup> As an example of one of the racially skewed or selective reporting by the Mail & Guardian, they alleged that the paper failed to report on a case of plagiarism where a white journalist had stolen the work of a black person but had acted swiftly to put on the front page, a story where a black person had plagiarised the work of a white person.

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<sup>20</sup> An example is given of the allegations against the former Premier of the Western Cape, where the *Mail & Guardian* failed to report whilst the story was very current and only chose to write a carefully worded story on it almost six months later. The tone of this article is in the sharp contrast to the one reporting on the alleged corruption by the Premier of Gauteng, Dr Mathole Motshekga. (See BLA/ABASA submission VOL p13).

In responding to this allegation van Niekerk dismissed it as poorly researched, sloppy and without foundation. He argued strongly that corruption did not have a colour attached to it and his publication would expose it whoever and in whatever form it found it. In supporting this stance he quoted Prof. Makgoba as saying “the most professional newspapers were the Mail & Guardian and the Beeld.” He argued that there were many, both black and white who took issue with the Mail & Guardian suggesting that the style and stance of the paper was colour neutral. He disputed the allegation that his paper refused to publish a letter from the ten black academics as alleged by BLA/ABASA. He argued that the letter was rejected on the ground that it was late for the deadline and could only be ran the following week. He also pointed out that everyone was free to publish in their columns as long as the article is provocative and well written and is received within their deadline. In dealing with other allegations the Mail & Guardian noted that BAL/ABASA was only making assertions but was not challenging the accuracy and truthfulness of their stories, consequently the editor praised the Mail & Guardian for its investigative journalism.

Regarding the report by Claudia Braude, Mr Van Niekerk submitted that he agreed with Professor Guy Burger in asserting that Ms Braude “started out with prejudice” and then went out to look for it. He submits further that the textual analysis of the report was made even shakier by the fact that the researcher took the complaint by BLA/ABASA at face value. He alleged that Ms Braude mislead herself by relying on the TRC evidence because that evidence was not intended as a finding and therefore was valueless. On the coverage of the African continent, Mr Van Niekerk contended that there is neither a paper nor a journalist who has visited and covered Africa as vastly as he and his paper have done. Their web site “is the largest Internet publication on the African continent with 2 million hits” in February 2000.

The Mail & Guardian responded to MMP’s allegations by counter alleging that the MMP failed to provide a credible account of the flow of events through which racism is engineered and carried up to the product of a publication and how the reader or audience thereof interprets the product to be racist. They argue that this approach is likely to arrive at unjustified assumptions like the theory that because of their positions as the main actors in the media, the editors transmit their cultural views into society at large. Secondly they dismissed the MMP’s second theory that a newspaper’s news selection and presentation represents a conspiracy. Dr Howard Barrell, the political editor, presented a series of factors that may influence the coverage and presentation of a story. He argued that these factors exclude both the cultural and conspiracy theories. He warned that these theories are good for academic purposes but are useless as a yardstick to “explain the media, its mode of operation and the character of its products”. He submitted that “not only are events unpredictable but also too is an organization’s ability to report on them”. He concluded that the unpredictability and autonomy of

events make it impossible for the editor “to maintain whether conscious or not, a coherent cultural or political perspective on developments”.

The Sunday Times also had its share of explanations to make. In addition to assertions of skewed reportage of corruption, they also had to deal with allegations of insensitive reporting and violating the right to dignity of black people by trivialising their lives and deaths, an allegation by BLA/ABASA. In dealing with the issue of reporting on corruption, the Sunday Times did not hesitate to state that corruption is a cancer in our society and needs to be rooted out. Mr Robertson dismissed the view that the Sunday Times puts more prominence in cases involving black persons.

The basis for the allegation on insensitive reporting was the assertion that it conveys the message that black lives are not important, at least not in relation to that of whites”.<sup>21</sup> At the centre of their complaint was firstly, the paper’s failure to properly cover violence that was rampaging the Richmond area in July and August 1998 and secondly, was the article by the Sunday Times’ columnist Mr David Bullard, which covered a visit to South Africa by a group of Americans. The bone of contention in the article was the part that read,

..anyway an official visit to Africa is a special case because it gives African-Americans a chance to discover their roots something they all like to do until they realise that they would probably be living in shacks without any running water, if their ancestors had not been abducted by slave trade..

Halle Qangule, testifying on behalf of BLA/ABASA, emphasised that slavery was a very sensitive issue to Africans and if ethics is something to go by, this article should not have been approved for publication. Responding to the first assertion, the editor Mr Robertson pointed out that as a weekly newspaper the Sunday Times “cannot cover all events that happen earlier in the week” but can at a most, give a summary and analysis of the main events of the week. On the issue of insensitivity, he noted that due to their policy of allowing vigorous exchange, it may be possible that on those issues which people hold the strongest views, some columns or letters may

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<sup>21</sup> As illustration of this contention, BLA/ABASA alleges that the Sunday Times of 19 July 1998, failed to cover the violence that was ranging in Kwazulu-Natal. They alleged that the only coverage of this incident was a single sentence that read: “Three people die in Richmond gunned down during violence last week”.

It is submitted further that “this was mentioned along with the death of six elephants including four calves which died when they were crushed by a train in the North East Indian state of Assam”.

BLA/ABASA argues further that, had the victims been white persons, the paper would not only mention the victims by names, but would go an extra mile to cover the “trauma suffered by the survivors and relatives of the persons”.

To support this argument, they compare this story with a heart rending coverage of the story (in the same issue of 19 July) of two children Andrea Glew and her brother whose parents were allegedly murdered by their brother”.

The essence of the comparison is that, even though the death of the parents was equally tragic, this may not be equated with a more politically sensitive and significant death of people in Richmond.

be viewed as uncomfortable and offensive to those who hold opposing views. In such circumstances, he argued, they offer the offended person a similar opportunity to express the objection to the column or letter, as it is their belief that constructive debates should be encouraged on such subjects. In his written response he had this to say:

We allow columnists the latitude to explore these uncomfortable subjects because we believe the danger lies in remaining silent or stifling debate on such matters.

He noted however that, as a rule such columns should be within the ambit of the law and should abide by the Press Ombudsman's code. Where the columns or letters involve specific individuals, such individuals are contacted about the issues before they are made public

In her report, Ms Claudia Braude also attacked some publications for publishing stories which depersonalises black lives whilst also promoting the stereotype that Africa was about violence, disaster and poverty. In responding to these accusations, most of the editors testified that due to financial constraints, they rely more on Wire Agencies for African stories and therefore, they were not liable for the racist undertones that may be implied by such stories.

Some editors did not approve of this response. Lakela Kaunda for example, believes that the last hands on the paper are the most decisive ones. She argued that it is the duty of every editor to change the paper to reflect facts in their right context. She noted that the root cause of this kind of reportage is that Wire Agencies will normally give "hard news stories" without providing any background to the story. She suggests that editors should not publish hard news stories but should wait to be provided with the background to such stories. In that sense they will be able to tell African stories in their right context with well-substantiated facts. She argued that reliance on Wire Agencies could not be a reason to justify bad journalism. She noted that most of these Agencies are not even based in Africa, which means that Africans rely on overseas agencies for news about themselves (a point which was also shared by Dr Nzimande of the South African Communist Party). She reckoned that it is high time that Africans should start developing their own networks in Africa.

Some newspapers have already adopted this approach. The Mail & Guardian pointed out during their presentation that they "do not rely on wire stories at all", instead they "have access to the coverage on Africa and the rest of the world carried" by their sister titles, the Guardian and the Observer.

Some editors admitted that they have failed their readers by relying on wire agencies. The acting editor of the Cape Argus, Chris Whitfield submitted that:

..we depend largely on news agencies for coverage of the continent. Unfortunately there are vast areas which are not adequately covered, partly because the major clients of the agencies do not regard Africa as a priority.

The SABC shared sentiments similar to those of Ms Kaunda and Dr Nzimande. During their presentation they submitted that it was their concern that because of scarce resources most of their documentaries about Africa are produced by Europeans. They submitted that in an effort to address this problem, they have established a 24-hour television channel in Africa and that they are in the process of establishing bureau in a number of countries in Africa.

In responding to a question from the panel about his response to the allegations in the MMP report that his paper promoted some racist stereotypes particularly against Africa, Mr Sibiyi's alluded to the fact that the headlines of the article in question were in fact misleading. However he argued that the MMP's assertion that the whole article was misleading was flawed and he objected to what he termed painting all newspapers with the same brush.

The SABC also had a similar defence when responding to the MMP's allegation that it carried a report which suggested that black foreigners are criminals. The SABC submitted that while they acknowledge that the MMP's report was valuable in as far as it helps in identifying ways in which the media re-inforces racial stereotypes, it is their belief that not all examples that they use are applicable to everyone in the media industry. In analysing the item in question, Ms Qunta on behalf of the SABC submitted that:

..now if the SABC itself for instance, went out and said, okay, these are criminals, we want to highlight drug taking or drug selling in South Africa and they went only to Nigerians, then it would be entirely a matter. You would then say why do you isolate Nigerians because there has been evidence that Asian gangs in this country come in and sell drugs. That would be entirely different but here they were, the actual report concerned a police raid so and I do not think that the MMP used the right example.

Professor K.K. Prah complained against the Cape Times accusing it of dishing up stories aimed at discrediting the African Renaissance and also for denying him the right to exercise his freedom of expression by refusing to publish his letter. The Cape Time's response was to admit that there was a possibility that someone was writing under a pseudonym and that the letter in question was in fact a fake. Regarding the issue of the refusal to publish Professor Prah's letter, the Cape Times submitted that it was willing to publish the letter provided it was edited to the right size. Professor Prah's point of contention was that the Cape Times wanted to edit his letter in such a way that they would remove the "heart" of his complaint, a point which Mr Scott of Cape Times denied.

During their presentation the Media Review Network accused the Cape Argus of propagating hatred and inciting violence against Muslims and Islam. The article in question suggested that the motive of the bombing of Dr Ebrahim Moosa, an internationally respected authority on Islam, might have been retribution for his criticism of PAGAD.

In responding to this assertion, the Cape Argus pointed out that the crux of the article in question was to speak out against violence as a violation of human rights. They acknowledged the fact that some stereotypes and perceptions might have developed in the society and they pointed out that they have taken steps towards rooting out these stereotypes.

They concurred with the Media Review Network in its concluding point that the values and attitudes of our society will always surface “among those who staff the news media”. They suggested that “it is only when stereotypes and prejudicial reporting is pointed out that the media becomes aware of the patterns which they have established”.

Considering the fact that it was not obligatory that all media institutions that appeared before the Commission should deal with allegations in the commissioned researches, some newspapers, radio and television stations chose not to respond to such allegations.

### SECTION III

## SOCIAL ANALYSIS OF RACIAL DISCRIMINATION AND RACISM

An investigation into racism in the media is pre-eminently a social and analytical inquiry. It advances by social analysis rather than by mere legal certainties. The Commission recognised that this exercise had to be based on sound theoretical analysis if it was to have any credibility. By preferring a social analytical method, the Commission was conscious of the fact that the terrain we sought to cover was largely uncharted territory. Besides, the Commission considered that to get to the roots and sources of racism, a deeper examination of the multiple and complex means whereby racism is expressed and experienced was imperative. This was always going to be a risky undertaking. Risky, because social analysis is, by its nature, a subjective matter. Nonetheless, we hoped that international scholarship that could be brought to the service of this study would help unearth or reveal hidden meanings and other impulses which generate racism in society. From the time the investigation was announced, the Chairperson of the Commission stated that the Commission hoped that the inquiry would hold up a mirror through which the media see how they are seen and experienced by the South African public.

Towards this end, the Commission commissioned two studies, one by Ms Claudia Braude<sup>22</sup> and another by the Media Monitoring Project. The understanding was that the research would be independent and would stand on its own without any undue influence by the Commission. The authors would take full responsibility for the content of their work. Despite a lot of pressure and criticism, the Commission resisted the temptation to comment on the reports. The time has now arrived for the Commission to state its position regarding the studies conducted by independent researchers on its behalf. When the Inquiry started, the HRC did not publish a definition of racism, preferring to encourage people in the media, in their submissions, to contribute to the debate by expressing their own understandings of the concept of racism. We are not aware of any serious critique of the reports by the media. What we had aplenty were mocking commentaries, outrage and ridicule but very little substantial engagement with the reports. Academics, thankfully, came forward and presented varying critiques of the reports. Among these are papers by Ms Lynnette Steenveld and Prof Guy Berger both of the Rhodes University's School of Journalism and Media Studies as

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<sup>22</sup> *CULTURED BLOODSTAINS: Towards Understanding the Legacy of Apartheid and the Perpetuation of Racial Stereotypes in Contemporary South African Media, November 1999, in Interim Report of the Inquiry into Racism in the Media.* The research report by MMP is published in the same volume as *THE NEWS IN BLACK AND WHITE: An Investigation into Racial Stereotyping, October 1999.*



well as by Prof. Keyan G and Ruth Tomaselli of the University of Natal Graduate Programme in Cultural and Media Studies.<sup>23</sup> In addition, Prof. Steenveld and Berger gave evidence at the public inquiry.

It is worth noting from the beginning that the brief given to the researchers was limited. It was limited to the “products of the media”.<sup>24</sup> By this was meant simply what the public reads or encounters. It was not considered to be necessary to delve into the processes that led to the publication of material by the media. In a sense what happened in the newsrooms could be judged by what the public read or heard/viewed. To have delved into the details of the news industry, ownership, race and gender representation would have been a mammoth task which might not have served the purpose of the inquiry. There were many who feared just that. There was concern that the Commission would be going about snooping into newsrooms, demanding to know sources and doing a head-count on the basis of race. We struggled to dispel such a distortion of the process.

It is noticeable that both research reports examine the phenomenon of racial stereotypes. The stereotypes paradigm has been used to try to explain the continuing production and re-production of racism as well as its mutation and persistence. A *stereotype*, according to the Concise Oxford Dictionary (Ninth edition, 1995) is “a person or thing that conforms to an unjustifiably fixed, usually standardised mental picture.”<sup>25</sup> Stereotypes function to distort reality, create false images, and justify preconceived notions about another.<sup>26</sup> Norman Duncan states that a “stereotypical representation of

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<sup>23</sup> Prof Keyan Tomaselli has kindly made available to the panel a selection of his papers and those by other members of his programme relevant to this inquiry. The Commission also received a commentary by Prof Norman Duncan of the University of Venda to the report on radio 786 together with a paper by Duncan: *Discourses on Public Violence and the Production of Racism*; S. Afr Tydskr Sielk, 1996, 263(3). A political critique of the reports by Dr Daryl Glaser of the University of Strathclyde, Glasgow is due to be published by the British journal *African Affairs* (forthcoming).

<sup>24</sup> A number of speakers and commentators believed that this ‘omission’ hamstrung the research from start. Keyan Tomaselli, for his part, argued that the terms of reference were vague, “resulted in research approaches which failed entirely to understand the nature of the media, how news is made, or how theory is applied”, in “Cultural Studies as Psycho-babble. Post LibCrit, Methodology and Dynamic Justice”, keynote paper prepared for the Third Crossroads Conference on Cultural Studies, Birmingham University, June 2000.

<sup>25</sup> This is the example of a racist stereotype as reflected in the *Encyclopaedia Britannica* (1810). This is what it says about the Negro: “Vices the most notorious seem to be the portion of this unhappy race; idleness, treachery, revenge, cruelty, impudence, stealing, lying, profanity, debauchery, nastiness and intemperance, are said to have extinguished the principles of natural law, and to have silenced the reproofs of conscience. They are strangers to every sentiment of compassion and are an awful example of the corruption of man left to himself.” (quoted in Husband: 1982;70). This, of course, is an extreme form of caricature but it forms the basis of the racist race theories of the time.

<sup>26</sup> Commenting on the unfavourable caricatures of black nations in the popular British consciousness in the 19<sup>th</sup> and 20<sup>th</sup> centuries, James Walvin observes that:

to justify his importation, his slavery, his freedom and finally his position as a free man, Englishmen conjured up a variety of stereotype images of the Negro best

blacks which emerges from the mass media... can be considered inherently racist; and this by virtue of the fact that it effectively aids in the perpetuation of the latter's domination at the hands of white groups who, in most cases, are the ones in control of most forms of mass media" (1996:172). One can then understand why the researchers independently arrived at the stereotype as a method of investigating racism in the media. It must be stated, however, that the brief was not limited to stereotypes. The problem with stereotypes as a means of understanding racism, is that it dwells on caricatures and when these are not immediately detectable, one would be without the means of understanding racism. Besides, caricatures can be easily refuted without addressing the underlying racial phenomena, or forms, to use a philosophical expression.<sup>27</sup>

Both reports draw extensively from cultural studies literature. The thesis is that news media does not simply represent, reflect and re-produce reality. The media is not neutral transmitters of information. Indeed, information is not neutral. It is not value free. Reality is seen through particular social, historical and cultural lenses and ideological microscopes. Braude then presents a historical critique of the media as legitimising white supremacy. She then deals with the manner in which stories about corruption in government and incompetence, for example, actually serve to shape public perceptions about black people in authority in the new dispensation. Braude then applies this theoretical discourse to stories published in the South African media within a given period. The MMP developed a different methodology. The theoretical foundation of their approach is the same as Braude's. However, they developed a set of propositions which they sought to test. Their findings are about the stereotypes in the publications examined as well as ways in which the propositions were refuted. These studies aroused a great deal of outrage, in part because they named some publications, analysed stories in given titles and in applying their method suggested that racial stereotypes could be found.

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suiting to each particular purpose. Almost without exception these images, which made such an impression on the public at large, bore little resemblance to fact. Caricature rather than truth was the hallmark of the English impression of the Negro.

In *Black and White: The Roots of Racism in RACE IN BRITAIN*, Charles Husband (Ed): Hutchinson University Library, 1982 at p71.

<sup>27</sup> David Theo Goldberg (Leonard Harris: 1999; 377) argues that stereotypes are not necessarily irrational or scientifically false. It is important to concede this otherwise the conceptual understanding of racism will be distorted and refuted. Goldberg argues that

It follows that racist thinking is not simply a matter of overgeneralisation grounded in conceptual mistakes and generating factual errors. It is not simply the impaired psychological functioning of an authoritarian personality as opposed to a tolerant one. Racist thinking is capable, in some cases, of avoiding both primary features of stereotyping: that is, the tendency to *rigidify* our conceptions of individuals by *ignoring* their differences in the face of some idealised group conception.

Lynnette Steenveld offered a positive critique of Braude's report. She argued that the weakness in Braude's study is the extent to which her study was weighted in its extensive treatment of the Radio Pretoria genre of racism. Braude then used that to argue that these origins of racism are to be found in leading media except that these are more subtle expressions of the same phenomenon. Steenveld goes on to say:

These then are all the discursive resources that are drawn upon, often unconsciously, and in uneven ways, in the reproduction of racism. This should give us at least a hint that 'racism' is not a clearly 'identifiable object' that we can easily go in search of. Rather, it is mutable; taking many different forms, in different contexts, and crucially depends on the relationship between the use of the discourse in relation to its perceived audience, and their frameworks for making use of the world.

Steenveld argues that the critical question is not whether there is racism in the media or indeed how much racism there is in the media in South Africa. "... even a 'little bit' of racism in the media texts is potentially potent because it serves to activate the racism that is already deeply sedimented in South African society." Even if these racist forms or meanings strike the readers, it merely points to the success of ideological meaning rather than the absence of racism as such.

Guy Berger's critique was of a different kind. He argued that both Braude and MMP's reports were fundamentally flawed. He charged that the Braude report in particular operated from a standpoint whereby it went about looking for racism under every bush and found it. Like Tomaselli, Berger felt that the absence of research into media consumers and their producers weakened the study considerably. They believed that the authors proceeded from an ideological base themselves and did not engage with ideology. They did not interview journalists nor did they seek clarification of their 'readings' of the particular stories chosen. The reliance on textual analysis and the failure, for example, to undertake audience research leads to assumptions that racial niche markets in themselves were racist. The two scholars suggest that the two reports failed to understand fully the operations of the media, failed to make necessary conceptual distinctions between race, racism and ethnicity. Tomaselli further states that this crude confusion about concepts leads the authors to adopt definitions which effectively renders all white people racists by that mere fact alone and fails to understand the expansive nature of culture and ethnicity.

The Freedom of Expression Institute (FXI) presented a critical analysis of the research studies. Having received legal opinion FXI chose to concentrate on the fears that the inquiry might cause parliament or the government to undertake new restrictions on freedom of expression. Attached to the submission is a stronger critique of the Braude report by John van Zyl. He claims that Braude "did not take the conventions of journalism into account" and that the research lacks an empirical basis or sociological data. Both criticisms, it would seem to us are ill founded. In particular, neither Braude nor the Commission sought to uphold journalistic

practice but, if necessary, to challenge it. Second, as previously stated by the likes of Berger and Tomaselli, nothing really turns on whether or not the research was empirically or statistically based. Naturally, Braude's views were always intended to be provisional and to stimulate debate about the critical issues raised in the research. That, by all accounts, she managed to do. The fact that van Zyl, like others who appeared before us, were anxious to equate racism with bad or sloppy journalism suggests that they either do not understand racism or they are simply wishing it away. It is worth observing the contention by Raymond Louw of FXI that his main concern was that the Commission and the inquiry was designed to eliminate racism. He charged that what will be restricted in the process was freedom of expression, a most undesirable outcome!

Much of this criticism fails to appreciate that the Commission by design decided neither to proceed into the study by *a priori* definition nor did it believe that it was necessary to test the research by interviews. The allegation that the Commission did not fully understand the operations of the media does not add anything to the fact of racism. What difference will it make to the *racist effect* of a story if one better understood what went into the story? It is the duty of the journalist, editor, publisher to craft their stories, opinions with such sensitivity, self-understanding and due regard to the variety of readers who will be confronted by their writing. In other words, what we have been enjoined to do may well be a different, if valuable exercise. It is not one which this project sought to undertake. One cannot criticise one for not doing what one never intended to do. In any event, the Terms of Reference were published in advance for comment. The only comment by Gavin Stewart of *Daily Dispatch* simply raised fears about the process itself. He simply advanced the bizarre idea that any investigation of the media was an attack on press freedom. One must understand, in defence of the researchers, that it was always intended that the media practitioners would have an opportunity to engage with the research, critique it and advance alternative readings of the material. Not many of them, except during the hearings, took advantage of this opportunity.

## **RACISM: TOWARDS A CONCEPTUAL UNDERSTANDING**

We made reference to the role and meaning of stereotypes in defining difference and in creating a hierarchy of such difference. In its crudest forms, in terms of moral values, civilisation and, as such, what is deserving of true humanity. Often these differences were identifiable physical, visible differences understood as ethnic differences or colour, or language, religion etc. Stereotypes, in crude form, go into the making or construction of racism, though they are not the whole manifestation of it. Lynnette Steenveld is correct when she says that '*racism is an ideology or discourse used to make inferences about people on the presumed notion of a 'hierarchy' of 'races' in order to maintain unequal power relations between*

*them.*' The 'presumed notions' are, in fact, untested but taken for granted. Racism speaks to a particular world-view and feeds on the prejudices of that society. Paul Gilroy has noted that racism functions best when it sets the victims in the victim/problem mould and then marginalises, excludes them. This is how he puts it:

Racism is not a unitary event based on psychological aberration nor some ahistorical antipathy towards blacks which is a cultural legacy of empire and which continues to saturate the consciousness of all white Britons regardless of age, gender, income or circumstances. It must be understood as a process. Bringing blacks into history outside the categories of problem and victim, and establishing the historical character of racism in opposition to the idea that it is an eternal or natural phenomenon, depends on a capacity to comprehend political, ideological and economic change (1987:27).

Gilroy is a black British social scientist. He writes from the experience of the mid-80s in Britain. He holds against Marxists that racism serves class interests. He also is insistent that racism can only be partially understood in terms of historical background and should not be viewed merely as a psychological phenomenon. In other words it is not just prejudice that one is concerned about but the effect or consequence of bringing prejudice into consciousness and practice or way of viewing the world. To understand racism as a process is to be alive to the fact that racism like all social phenomena advances and mutates in various forms in response to social circumstances. Its manifestations must also be examined afresh in the light of the prevailing context.

Much has been made of the difference between race, racialism and racism. Race is a neutral concept. It has no genetic foundation because one cannot any longer draw conclusions of value about racial difference. Anthony Kwame Appiah (1992:19) calls it an illusion. It is, however, a social construct because it often is a factor in social relations. To the concept of race, culture and social practice are often attached. These, however, are contingent characteristics which cannot be predetermined according to race. That is why the concept of race is ephemeral. Racialism is the means whereby 'race' becomes the basis of differentiation. It suggests that certain groups of people have common inheritable characteristics which divide them from others, a kind of racial essence. There need not be anything offensive about this notion as long as it does not so essentialise race that it presumes moral values inherent only in particular groups. Then that becomes racial prejudice, the first rung on the racism ladder. Those who believe or structure their practice according to the notion that racial difference bestows a moral status are racists.<sup>28</sup>

We concede that the researchers did not spell out these essential differences clearly enough. Such a failure may have resulted in some confusion. The problem with operating from the basis of racial stereotypes, something that the critics failed to point out, is that it can be refuted without addressing the

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<sup>28</sup> On this distinction see also John Rex in Leonard Harris: 1999; 149 and the authorities cited there.

essence of racism. Further stereotypes miss out factors inherent in manifestations of racism like structural forms of racism and the institutional character of racism. In other words, the ideological dimension gets left out. It must also be conceded that the methods applied by the researchers opened themselves to criticism. That is not to say that they would not have been criticised anyway whatever method they applied. In other words criticism became a tool of avoidance. What is a valid concern is the fear that having developed stereotypical propositions or having undertaken a theoretical analysis, one then goes out to see where and how it fitted, which can lead to injudicious applications of theory. The option we take is one which we suspect would have been difficult for the critics. We believe that the starting point of all theory is practice and experience. The narratives told by those who experience racism provide the basis for interrogating racist discourse. One therefore needs to take Appiah a step further. Racism is a belief system, a philosophy of life; a belief system whose purpose or effect is to exclude or seeks to diminish the value and self-esteem of another on the basis of race, colour, or characteristics associated with race, like language, culture, religion or place of origin.<sup>29</sup>

Two further points must be drawn from this. What is the role of power and what about consciousness and consequences? Much has been made of the role of power in the formation of racism. It has even been suggested that white people in the new South Africa cannot be racists because they do not have power. Political power in the new South Africa is in the hands of the black majority. They have the instruments of power. In a democratic system power is diffuse. In fact the power of the modern, democratic state is limited and the role of government in a growing sphere of national life is decreasing as more and more utilities are privatised. In addition, constitutionalism and rights limit the exercise of the power of the state beyond establishing parameters and setting conditions conducive to development. Other actors exercise power. Individuals and communities exercise power. In the private sphere, corporations exercise power. Power, therefore, in the modern state needs to be understood in more nuanced ways.<sup>30</sup> In any event, one should

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<sup>29</sup> Goldberg offers another neat definition of racism: “Racists are those who explicitly or implicitly ascribe racial characteristics of others which purportedly differ from their own and others like them; these characteristics may be biological or social. Yet the ascriptions must not merely propose racial differences. They must assign racial preferences, or explain racial differences as natural, inevitable and therefore unchangeable, or express desired, intended or actual inclusions or exclusions, entitlements or restrictions (supra; 370).

<sup>30</sup> David Goldberg warns that racism can be effected via the most conceptually minimal form of the sense of power – “whether desired, actual, or rationalised – that is the central mark of racist beliefs, practices and institutions. Conceived in this way, racism need not be about exploitation in the strong sense of forcing, coercing, or manipulating racial others to maximise surplus value for the ruling racial class, ... For racism may simply be about domination in the weaker sense of being in a position to exclude others from (primary) social goods, including rights, to prevent access, or participation, or expression, or simply to demean or diminish others’ self-respect...” (371).

not make assumptions about solidarity based on deterministic understandings of race/s. The truth is that power relations between black and white people in South Africa are still skewed. Statistics reveal that the indices for poverty are that a disproportionate number of black South Africans live in extreme poverty, more blacks are unemployed, live in informal squatter camps, are homeless and suffer from diseases like TB and HIV/AIDS. Representations of poverty in our society show a stark black/white face. Resort to the concept of power, therefore, must be done with the understanding that the meaning of power has become very complex and one cannot use simplistic notions of power when the concept has undergone transformation of meaning and content in the new South Africa.

The second matter that comes up for consideration is the role of intention and consequences. If one begins from the objective fact of racism in society, something everyone conceded, the theory of causation demands that we seek causes to the observable or experienced effects. In many ways, racism becomes a theory of explanation. It seeks answers to life circumstances. It is important to consider and exclude other explanations before one resorts to racism as a factor in social phenomena. However, it clearly cannot be excluded in most circumstances. Intention implies starting from the other end. Intention implies a motivation or basis for particular forms of action.<sup>31</sup>

The understanding of intention will have to draw from the jurisprudence of criminal law where *mens rea* must be attributable in instances where the logical consequences of particular actions could have been foreseen or in instances of common purpose. In equality, South African courts are yet to give meaning to and elaborate on intention in constitutional law. One of the most potent institutions in this respect is the news media, because it conveys words and images on a wide canvas and creates or perpetuates a common culture. That is the essential reason for the SAHRC hearings. If the effect of the media is to deepen racist perceptions - to continue to anchor the population in the association of merit with skin colour - then the question of conscious intention is not the only thing that matters. It is relevant certainly; but the effect in society will be felt whatever the intention.

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<sup>31</sup> Paul Gilroy (1987:32-33) suggests that many social struggles can best be analysed in terms of their effects rather than their intentions. Referring to discrimination as a form of oppression generating a political consciousness among the victims, drawing from Stuart Hall, he argues that there must be a “shift away from seeing exploitation (read ‘discrimination’) as the sole route to political consciousness and encourage consideration of the *effects* of subordination based in forms of power which have at best a partial and ambiguous connection with the extraction of surplus value.” Elsewhere he says: “apparently disparate struggles can be related analytically to the processes of class formation by looking directly at their effects rather than solely at the intentions of the people who conduct them.” Goldberg identifies a different category of racism: “the mark of racism in these instances will be whether the discriminatory expression reflects a persistent pattern or could reasonably have been avoided. Racist institutions are those, by extension whose formative principles incorporate the beliefs and acts in question” (*supra*; 370).

The United Nations Declaration on the Elimination of All Forms of Racial Discrimination states emphatically that racial discrimination is an offence to human dignity (Article 1). The International Convention defines *racial discrimination* as

Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

South Africa ratified ICERD in January 1999. Ms Nozipho January-Bardill serves on the Committee for the Elimination of Racial Discrimination, the treaty body charged with the task of monitoring and implementing ICERD. ICERD does not refer to racism as such. But it must be apparent that, given Appiah's definition of racial discrimination, ICERD has gone beyond the neutral understandings of racial discrimination. What the definition fails to do which is crucial to understanding racism is that it has not taken due account of the ideology structure of racism. Racial discrimination as defined in ICERD is not an accident of history nor is it just a mistake. It is founded on a philosophical basis and a view of life which motivates racial discriminatory action. ICERD, therefore, assumes the underlying racism is racial discrimination. To the many enquiries we received about the definition of racism we wisely referred everyone to the definition of ICERD because we did not see the necessity of re-inventing the wheel. A proper analysis of the definition, however, is necessary in order to understand the full meaning of it.

Discussion during the Public Hearings was about the institutional and systemic understandings of racism rather than the fact of it. For example, when John Battersby says that he is a racist, he does not suggest he is congenitally racially offensive to others nor does he necessarily consider himself consciously superior to other races. He explains that the social effect of his upbringing and the environment in which he was brought up as well as the benefits of that society which he enjoyed have placed him at a level where consciously or unconsciously he makes certain assumptions about value and excellence drawn from those assumptions. Very often these may offend against the sensibilities of those who were brought up differently or whose cultural values have been suppressed or for who a history of white racial oppression has meant that their life choices were limited. The system which South Africa has inherited is inherently racist in that it is founded on certain core assumptions of value. The new dispensation seeks to correct and transform that and can only succeed to a limited extent. White people in South Africa are not congenitally racist. Racism is a process of socialisation. It is learned and it can be unlearned. To challenge it though has to be by deliberate, intentional effort. The truth is that many people do not do that. A



racist world becomes a comfort zone which we live with, we have inherited, we take for granted.<sup>32</sup>

It is useful to refer to the Gramscian theory of hegemony in seeking to understand how power relations operate. In the nature of things, there is a veritable history of dominance by the European culture and world view in South Africa to the extent that such a uni-polar world view has come to be taken for granted. That means that certain value systems are assured of dominance and others subordination. Hegemonic culture is of necessity partial because it excludes and marginalizes others. The challenge in South Africa is to recognise the multiplicity of value systems, institutions and structures and to understand the ways in which these interact in the formation of contemporary South African society. Where this is not recognised, then the systems and institutions serve only a hegemonic function. It appears that that is something the South African media are yet to embrace.

That puts into perspective the concerns of Howard Barrell. It is not the whiteness of the skin as such that implies racism. Skin colour is immutable. If we relied on that then people by mere fact of being white would be racists. What it is that the world white people inhabit and have inhabited historically has been a racist environment. Racism should go beyond individual behaviour or personal prejudice to embrace a whole set and history of forms of understanding the relationship between other racial groups. Racism is institutional and structural.<sup>33</sup>

Racism in South Africa is essentially a societal system based on the belief – created over centuries and inculcated in both Black and White people - that White people are superior to Black people: they are more intelligent,

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<sup>32</sup> The Press Ombudsman has helpfully recommended to us a work by Koopman & Robb: *SHIFTING PARADIGMS*, Early Learning Resource Unit Anti Bias Project, 1997. It gives a definition of what it calls ‘modern racism’ in order to distinguish it from traditional understandings of racism as prejudice by white against blacks plus power. It says modern racism is “the expression in terms of abstract ideological symbols and symbolic behaviours of the feeling that black people are violating cherished symbols and making illegitimate demands for changes in the racial status quo.” It says also that this racism is not consciously malicious by intent but is still based on the assumption that black people and their cultures are inferior to that of white people.

<sup>33</sup> John Rex’s comments on institutional racism are apposite: “Much more important is the racism inherent in the belief system of a society. Here actions are taken on the basis of common-sense reasoning, using common-sense knowledge of the world. Even in a society committed to universalism and equality of opportunity, such common-sense knowledge is marked by the use of stereotypes of minority individuals which are derogatory to them or which place them in questionable settings. This is inevitably the case with common-sense knowledge of a society with a history of war and imperialist involvement. Even liberal culture in such a society is impregnated with what are in effect racist and paternalistic assumptions...” (151).

competent, far-sighted, inventive, self-controlled, advanced, attractive, spiritually favoured, morally good and so on.<sup>34</sup>

Racism *results* in race prejudice, racial stereotypes and racial discrimination. It is not the outcome of those attitudes and behaviour, but one of their causes. It is wider and deeper than any of them. Its wellsprings are more profound. It is grounded in an historic exploitative relationship between people of different degrees of pigmentation. History is the essential soil in which racism always grows.

The history of any racist relationship creates a number of features, which characterise *racism*, and set it apart from other forms of race discrimination and prejudice.

- The physical characteristics by which the 'other' is recognised becomes an entrenched mark by which they, as a 'division of humankind' are recognised. That mark is then assumed to be *intrinsically* associated with inferior or superior characteristics. The skin colour is *given meaning* in terms of value or merit.
- The assumption of intrinsic merit based on skin colour also justifies the monopoly of power and decision-making in the hands of the dominant group. In turn this leads to reduced access by the stigmatised group to everything that enables people to develop, enhance their lives and achieve success. The initial judgement justifies exclusion and the results of exclusion justify the judgement.
- The historic ideology of a meritocracy based on race is passed down through the generations at the level of truism. It is not questioned at the time it is conveyed - by society to child - because the information is offered uncontroversially. It is also justified by what the child sees in the world of reality. Any later questioning of truism is difficult when it has been accepted in early childhood when values are formed.
- Most importantly, racist ideology is absorbed in the same way by both races. The national culture is essentially the culture of the dominant 'race', but because it is national everyone within that culture absorbs it. In South Africa Black children are given the same essential messages as White children - to the effect that White people are superior to Black people. Like White children they receive the information as fact. It is justified by everything they see around them in terms of successful access to resources and opportunities and worldly achievement. This is a defining characteristic of racism: both sides believe the ideology to some degree. This is different from mutually hostile groups who are roughly equal in strength: neither of them internalises the stigmatising stereotypes of the 'other'

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<sup>34</sup> One has to be cautious about resorting to a too rigid ascription of superiority/inferiority. At the end of the day what must count is the purpose or effect of such action on those of another race group (Goldberg;371).

- If racism is the outcome of an historical process it is not the personal fault of anyone now experiencing its effect. Although racism is expressed by individuals, it is not primarily or only a personal characteristic. It is a manifestation of a centuries-old shared ideology about how merit is measured by a person's physical appearance. Individual people will have bought into or internalised that ideology to a greater or lesser extent, but they did not voluntarily create or espouse it. Personal responsibility comes into the equation only when the syndrome is understood but neither acknowledged nor rejected in practice.

### **'SUBLIMINAL' RACISM**

The dictionary defines 'subliminal' as '*below the threshold of sensation or consciousness*'. The implication for racism is that the racist idea may be held and acted on without conscious intention - even in the presence of anti-racist conscious beliefs.<sup>35</sup> The psychological disciplines define subliminal mental constructs as those held in a part of the mind against which the conscious mind defends itself for some long-forgotten reason. They cover many aspects of our lives. The unconscious part of our minds is influential in our behaviour without our realising it. What makes us dysfunctionally angry, why we fear some people and not others, why we avoid certain situations and people, why we act in self-destructive ways, what 'comes over us' when we behave irrationally - these are the questions that arise from the activity of our subconscious minds.

It is standard understanding in the psychology professions that we are not consciously in touch with all of our impulses and behaviours. And it is understood that these subliminal drives often derive from thoughts and feelings we would rather not have, and which we therefore repress. They are very often linked to the emotions of shame and guilt.

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<sup>35</sup> We would like to express hesitation about reliance on the concept of "subliminal racism". That is why we have it in inverted commas. The reason for our caution is that no legal document expresses a concept like that. In addition, the concern we have is that one may avoid taking responsibility for what one does subliminally-without consciousness. More pertinent, however, in anti-racism discourse, is direct and indirect racism. Indirect racism occurs when a course of action is taken with a desired purpose but then has the effect or consequence of discriminating against others on the basis of their race. In such a case one takes responsibility for the consequences or effects of one's actions whether intended or not. The U K Race Relations Act, 1976 captures this adequately:

A person discriminates against another if he applies to that other a requirement or condition which he applies equally to persons not of the same racial group as the other, but (1) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion than the proportion of persons not of that racial group who can comply with it and (2) which he cannot show to be justifiable irrespective of the colour, race, nationality, or ethnic or social origin of the person to whom it applied and (3) which is to the detriment of that other because he cannot comply with it.

Racism falls clearly into that area of our experience - for Black as well as White people. Especially in South Africa today, the guilt and shame associated with racism for White people can be desperate. The Mail and Guardian's editor, Philip van Niekerk, graphically expressed his reaction to scrutiny of the media over race because of the emotions it aroused. '*Racist is the most provocative insult that can be levelled against my colleagues' and me.* And for Black people the idea that they have internally colluded, however involuntarily, can be truly punishing. For both, denials can be a preferred option.

However, even if we accept that racism may be subliminally nurtured and acted upon, the question is whether it is useful or even legitimate to address so-called subliminal racism. It can be argued that only conscious behaviours and outcomes may be the subject of public inquiry without attracting 'thought police' implications. Besides, by definition racism must have purpose or effect. That means that there must be some objective criteria for determining its nature, existence or visible effects. It need not be discovered simply by some psycho-analytical manipulation. It is real. It is felt and it is experienced. Subliminal, we suspect is simply shorthand for unacknowledged or less crude and therefore subtle forms of racism.

The problem is that our behaviour and the outcome of interactions may well be affected by subliminal ideas. Indeed, very often our behaviour can be explained *only* by reference to unconscious drives. And while no one can legitimately censure another's thoughts, we may all be involved in their consequences. Does that mean we may have a legitimate interest in subliminal behaviour? Serial killers and rapists are known to be subliminally driven. Should we therefore desist from comment on the results? From time to time in war, terrible mistakes are made, none of them consciously, and misplaced weapons kill people. Are they then to be placed outside of the arena of public interest?

- The Black South African psychoanalyst, Fakhry Davids, describes the genesis and effects of what he calls 'internal racism' (1998 Lionel Monteith Lecture, London 1999). Referring to the British inquiry into the death of the Black teenager, Stephen Lawrence, he relates how the White police on the spot failed to take the necessary action to save the life of Stephen and to pursue the White youths who were responsible for his fatal wounding. This was because they entertained an initial conclusion that Stephen had been stabbed by the other Black man present at the scene - Stephen's best friend, Duwayne Brooks, who was frantically seeking help for his dying friend. Davids asks what happened at that incident 'to seriously interfere with her (the senior officer's) capacity to function in her ordinarily good and conscientious way'. Davids concludes that 'what may have gone wrong was that internal racism was mobilised in the officer's mind, paralysing her ordinary professional functioning'.

South Africans will be familiar with scenarios in which different assumptions are made about what is happening depending on whether the players are Black or White - the result of which can totally distort the thinking of those present. In most cases the principals will deny consciously invoking different stereotypes to match the skin colour. What matters is not the intention but the effect. In Stephen Lawrence's case it was fatal.

- A Black person who is chosen, in competition with White people, to fill a vacant position is assumed to have had the benefit of 'affirmative action' and to have been chosen because of her/his colour. The breach of the norm that White people *are* 'the best for the job' means the White person who does not get the job *feels* discriminated against on the grounds of colour. They may or may not consider that to be a good thing as a corrective from the past. But the point is that racist assumptions are made - possibly also by the successful Black candidate.

Examining racism in the media must take account of the following factors:

- The measures that could be used to assess the extent to which racism is being consciously addressed, including the positions of power held in the media by Black people and White people.
- Expressions of the wider cultural influences in South Africa from the arts to versions of history, from language and religion to sports and games, from significant images to taboos. This means widening or altering the concept of normality.
- Treating different perspectives as equals in decision-making, so that the view from previously excluded sectors has as wide a lens as the most powerful.
- Contextualising racialised phenomena to challenge inherited explanations that were taken for granted in the past: how to report Black people's poverty and violence and failures and White people's successes in relation to our history.
- Widening awareness of the subjectivity of all communication - as it is given and as it is received; and a willingness to open dialogue to create understanding
- Exploring the effects of different styles of reporting and analysis in terms of their cultural roots and power implications.
- The way that the full 'South African story' is reflected in the media so that different versions of our identity open communication rather than closing it.
- Explaining the common phenomenon that Black people frequently complain of the operation of racism, while their White colleagues experience good relations across the colour line.
- The role of acknowledgement and restitution in healing the past: are they prerequisites to future health.
- How can the media be monitored or monitor itself in terms of its progress in treating racism?

- What on-going process would be useful to enlarge the effectiveness of the media in coping with our racism inheritance?

At the heart of this inquiry are particular forms of racism expressed in the manner in which representations of crime, corruption and incompetence by black people in positions of authority are made. This has been compared with the way in which white representations have been handled. This matter is not without significance in the construction of racism. Paul Gilroy, drawing from the experience of policing in Britain says that where crime by black people is made prominent and may even dominant public perceptions of crime, this has grave implications for the politics of race and racism (1987:74). Depending on the manner in which crime is reported, the implications may be that crime, corruption and incompetence were inherent to black culture or sense of being. If any such perceptions are allowed to take root, they lead inexorably to and give credence to the notion of crude racial stereotypes referred to elsewhere in this report. He goes on to say that anti-racist thought and action should seek to demonstrate that “obsessive concern with black law-breaking has come to sit at the centre of contemporary racist thought. Depending on the nature of the reports, crime reporting may be providing a racist explanation for crime and corruption. When such reports are given without adequate contextualisation or in comparable terms, they are simply neutral statistics but they convey particular meanings and they have social signification.<sup>36</sup> Besides, they could also be misleading in that they would create a generalised perception of the locus of criminal behaviour. It has to be said that there is substance to the charge that some crime reporting in South Africa lends itself to the charge that corruption in the public service resides with black people. These are what Gilroy calls “the hub for the wheels of popular racism...”(1987:110).

Because of the prevailing power relations, the reality in South Africa is that racism is manifested as white racism. That is a fact. Because of these power relations, many whites control capital and the means of production. In the workplace, or in the neighbourhood, these power relations play themselves out in exclusion, and violence. Over and above this, there are more subtle ways in which racism in our society is expressed. It is in the assumptions of order and value, of the good which infuse our systems. The effect of these assumptions about standard values or norms, the ‘taken-for-granted’

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<sup>36</sup> David Beresford of the Mail & Guardian engaged in such an exercise himself when, faced with the allegations against Dr Helena Dolny which he found initially incredible, undertook background searches and ended up with a story explaining the motives of the main complainant against Dolny (“The scribe who caused all the trouble”, Mail & Guardian, 6-12 August, 1999). If that paper had treated Prof Njabulo Ndebele, they would have found that allegations that he was involved in a R20m fraud on his university was without foundation. Instead, explanations by Ndebele were received with a rejoinder by the Editor. Is there an explanation for such differentiation in treatment of two prominent South Africans? These, in a sense, are the questions Mathatha Tsedu (The Star; “Journalism’s coloured mirror”, 26 July 1999) wanted answers to and which David Berresford failed to provide.

practices is to exclude and render the 'other' alien and un-belonging. In these instances exclusion may not be direct, it is simply being made to feel unwelcome and alien.

Dealing with racism, therefore, requires being alert to those manifestations or behaviours which have their root in a history of hegemonic relations between black and white people and which continue to be discriminatory in effect, whether intended as such or not. The non-racist approach is to be in continual check of one's assumptions and to test them against other ideas and situations.

### **DEFENCES: DENIAL AND EVASION**

Difficulties to dealing with racism effectively always have to contend with the fact that racism is usually denied or unacknowledged. At the same time it is possible to deny the charge of racism because especially in its psychologised forms one cannot easily fathom the deep recesses of one's consciousness. At the same time racism is often intellectualised. This rationalisation often denies the reality, meaning and effect of the experiences of those who are victims of racism. Likewise, racism mutates and manifests itself in many forms which requires new understandings of the phenomenon.

The difficulty about attaching racism to white people as such is that although common experience in South Africa suggests that most perpetrators of racism are white South Africans, it is still unacceptable to charge that every white South African is a racist by reason of the colour of the skin. What that does is that it causes other forms of racism and ethnic intolerance to escape attention and scrutiny. Equally, it means that no effort need be expended in countering racism because it is immutable in any event. Another response has been expressed. That is that there is an epistemological problem with attaching racism to the mere fact of being white. It says that by a circular argument, white people are doomed to be racists and if they deny it, then it proves the proposition that they are<sup>37</sup>. That is a form of tautology.

Nonetheless, denial of racism and evasion is a common trait. Denial of racism is a reaction to the existing sanction of racism as a socially unacceptable way of human behaviour. Denial is due to the fact that modern society has elevated tolerance and equality to a virtue. Denial may be a refusal to be affected by the suffering caused on another. To the charge that one is unable to refute allegations of racism if one were a white person with a historical baggage, one can draw attention to the fact that the starting point in dealing with racism is to acknowledge the suffering of another. If one has

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<sup>37</sup> This charge was forcefully put by Prof Anton van Niekerk, a philosopher from Stellenbosch University in a debate on the forthcoming National Conference on Racism, at Stellenbosch University on 1 August 2000. The event was organised by the Cape Town-based Institute for Justice and Reconciliation.

acknowledged that then one can debate as to whether such suffering is a necessary consequence of one's actions or omissions and whether there is anything one could have done to avoid the outcome. The haste to refute is to seek intellectual resources like verification or falsification, in order to avoid the full import of racist action and consequences. This, Dimitrina Petrova refers to as a form of implicative denial, "inserting a shield of rationalisations between the facts and the moral responsibility that they suggest" (1999:5). Another form of denial Petrova draws attention to is cultural denial. This occurs when a cloud of cultural consensus assumes the truth or veracity of particular set of facts without examining them deeper. For example, the idea that illegal aliens are criminals and bring disease to the country is generally accepted without much questioning and the facts are not fully examined for their refutation of this central thesis.

Once again we draw attention to the fact that the media can create a veneer of a popular acceptance of some assertions like crime and corruption have increased since 1994. Another form of denial is when the argument gets deflected to other equally important matters. For example, the debate about racism gets refuted on the basis that crime and poverty are more pressing matters which the concern about racism seeks to avoid. The other is a counter-charge: condemning the condemners. This is often expressed as reverse racism! Another version of this is to cry "race card" whenever an allegation of racism is advanced. What this does is that one does not have to examine the charge or to check its cogency. It is dismissed out of hand as a resort to the "race card". A most sophisticated form of denial is the constitutional argument. It simply restates the view that the Constitution protects all rights and that there is equality. To be concerned about racism is to deny equality or to seek protection beyond what the Constitution guarantees. This has been expressed as colour-blindness. Colour-blind rhetoric clouds its own hegemonic aspirations. It is assimilationist and fails to recognise cultural diversity and race difference. Diversity, however, should not be embraced without caution either because as Neil Gotanda has put it, "diversity in its narrow sense does not truly challenge existing racial practice but, rather, seeks to accommodate present racial divisions by casting them in a positive light. All too often discussions of diversity do not address its central problem, the transformation of existing categories of domination, into an altogether different, positive formation" (1995:271). Stanley Cohen (1995:58)<sup>38</sup> has outlined a large number of such denials. Their values is not so much to accuse rather than to reveal and pave the way for acknowledgement. Acknowledgement of racism is an important prerequisite to dealing with it in a healthy rather than in a pathological manner.

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<sup>38</sup> DENIAL AND ACKNOWLEDGEMENT: The Impact of Information about Human Rights Violations; 1995: Jerusalem, The Hebrew University more specifically in Chapter 2, pp19-58.



In conclusion, it will be noted that we have spent a considerable amount of space to elaborate on the variety of meanings, expressions and manifestations of racism. We have done so because an understanding of racism has a bearing on what steps or actions get taken to combat it or what effect it has on anti-racism strategies. What has not been stated here adequately enough is the fact that racism is parasitic. It attaches itself, often, to other defensible, socially acceptable discourse and action. It becomes necessary therefore to prise out the accretions and mutations of racism. Goldberg (1999:392-3). reminds us of the strategies for combatting racism:

Just as a plurality may be required for moral condemnation, so no single mode of resistance to racism will succeed exhaustively. Racism's adaptive resilience entails that we have to respond with sets of pragmatic oppositions appropriate to each form that racism assumes. Institutionally overcoming apartheid must take on forms different from opposition to jury practices or discriminatory employment and housing practices in the United States; ideologically, the appropriate kinds of response to claims of racial superiority or inferiority will differ from those to racially interpreted cultural differences; and scientifically, critical attack on racist metaphors and concepts insinuated into standard theoretical articulation will differ from the responses appropriate to scientific theories supporting racist hypotheses. In general, the ways in which we are to resist rational articulations of racism will diverge from critical opposition to irrational racisms as, indeed, also will the appropriate responses to rational racisms in the weak and strong senses.

## SECTION IV

### LEGAL AND COSTITUTIONAL ANALYSIS

#### JURISDICTION AND *LOCUS STANDI*

It has been argued in particular by counsel for the Mail & Guardian and the Sunday Times in their response to the initial request by the BLA and ABASA dated 23 October 1998, that the Commission did not have jurisdiction to entertain the initial request because such a request would involve the Commission making a finding which would in effect subordinate the right to freedom of expression to the right to equality. It is argued that that is a function the Commission “is neither equipped nor empowered to do” because

It is simply beyond the jurisdiction of the HRC to investigate ‘delicate questions of law for the decision of which a court of law is *prima facie* the proper forum.

We are taking this submission into account because in their subsequent submission, counsel for the Mail & Guardian has urged it upon us.

In their March 2000 submission counsel for the Mail & Guardian seek to restrict the exercise of the jurisdiction of the Commission on other grounds. While maintaining the argument that the Commission has no authority to “balance” competing rights it is now argued that the nature of the inquiry as indicated by its Terms of Reference, inasmuch as no evidence was properly “tested” under cross-examination, the Commission is precluded from making any “finding” because the Commission has already agreed that it not the intention of the inquiry to make a finding of racism against any title or newspaper or individual journalist/editor.<sup>39</sup>

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<sup>39</sup> This is the argument consistently made by Ms Dene Smuts, MP of the Democratic Party. In her contribution to the snap debate on the subpoenae in parliament on 1 March 2000, Ms Smuts returned to her favourite hobbyhorse. She insisted that

The HRC is still bent on balancing rights, a judicial function; and it is now, as then, debating the ranking of rights...Rights can be limited only by law of general application, and only the courts or duly constituted tribunals can adjudicate on the basis of those. There is no guarantee that free speech will be given primacy over dignity and equality in a complaint brought by, for example, the Black Lawyers Association...

For reasons best known to her, Ms Smuts insists on a position that has no legal justification. The Commission has never advocated the “ranking of rights”. On the contrary, we have stated that there is no hierarchy of rights. Astonishingly, it has been the politicians and some editors who have been inclined to elevate one right over others even as they deny it. It is noteworthy that Ms Smuts and her party advocate an amendment of the HRC Act, with a view to limiting the powers of the Commission and, indeed, as she has often stated, limiting the scope of functions and operations of the Commission. What appears to be her ultimate aim is for South Africa to have a watchdog without teeth – the quintessential toothless bulldog! See further argument below.

Counsel for the Mail & Guardian are the only ones who argued for a restricted interpretation of the scope and operations of the Commission in this manner.

This argument has to be dismissed. It has to fail because if taken to its logical conclusion, the Commission would not be able to discharge its constitutional function.<sup>40</sup> The Powers, Duties and Functions of the Commission are set out in s.184 of the Constitution and in s.7 of the Act. In addition, the Terms of Reference and Procedure for the inquiry<sup>41</sup> were adopted and published by the Commission. The Terms of Reference state as follows:

1. To investigate the handling of race and possible incidence of racism in the products of the media and whether such racism as may be manifested in these products constitutes a violation of fundamental human rights as set out in the Constitution.
2. To establish the underlying causes and examine the impact on society of racism in the media if such racism is found to be manifested in the products of the media.
3. To make findings and recommendations as appropriate.

It is worth noting that these Terms of Reference were never challenged in court as *ultra vires*.

In addition, the Commission and SANEF including some editors who were not members of SANEF, agreed the scope of the inquiry as stated in the Chairperson's Opening Statement to the Inquiry on 1 March 200:

6. The Hearings will be conducted according to the broad parameters set out in the Government Notice of 12 February 1999. This means that the Hearings will seek to achieve the objectives set out therein.
7. It was agreed that witnesses will be invited to comment on the following questions in their submissions:
  - i) insights into the operations of the media and how racism is reflected therein;
  - ii) recommendations about the role of the media in the construction of a society free of racism;
  - iii) recommendations as to how the freedom of expression and the press can best be applied in the construction of a new South Africa...

The Statement goes on to say

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<sup>40</sup> We are indebted to Prof Karthy Govender, a member of the Commission, for drawing our attention to a Canadian case that supports our argument. In *R v Big M Drug Mart Ltd* 1985 18 DLR (4<sup>th</sup>) 321 @ 395-6, the following is stated:

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...in my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the specific rights and freedoms with which it is associated within the text of the Charter.

<sup>41</sup> Government Gazette Notice No 16 of 1999 published in Government Gazette No 19740 dated 12 February 1999.

11. The panel will seek to determine what may constitute racial stereotyping or displays insensitivity that may cause pain or hurt to a reader of a certain race, ethnic, religious, cultural or linguistic group.

12. It is not the purpose of the inquiry to find any individual journalist, publisher or title guilty of racism.

13. The panel will consider recommendations or proposals presented to it and will make recommendations which will in turn contribute to the ultimate outcome of the process by way of either a code of conduct, guidelines or specific proposals directed at specific institutions.

It must be noted that in terms of s.9 (6) of the Act, the Commission has the authority to determine the procedure to be followed in any investigation and that such procedure will be published in the Government Gazette. It is not disputed that the Commission has followed this procedure. In setting out the Terms of Reference the Commission was careful that the issue and nature of racism was not prejudged. It therefore referred to “race”, a neutral, descriptive expression. In other words, the first stage of the inquiry was to determine how the different races of South Africa were reflected or represented in the news media. Second, it sought to determine whether any of such treatment of race could be considered to be racist in any way. The Commission was also adamant that it did not wish to begin the inquiry on the basis of a set definition of racism. Rather, the Commission preferred that an understanding of racism should emerge from submissions and evidence from the inquiry. Whereas “race” and “racialism” are value-free expressions, racism, as we understand the expression, constitutes unfair discrimination in terms of the Bill of Rights. Finally, the Commission deliberately sought to confine its inquiry to the “products of the media.” That was because, in part, the Commission wanted to dispel fears that the Commission would be raiding newsrooms or would do a headcount of racial representivity or would be interested in news sources. In another way, however, it made sense to limit the scope of such an inquiry in order to make it more manageable.

It must be remembered that although it had been agreed that witnesses would not be subjected to cross-examination, meaning the hostile adversarial questioning that takes place in a court of law, interested parties either directly or through their legal representatives were allowed to ask questions. It is true that the process was not intended to determine the credibility or veracity of the evidence given before the panel. It had been made clear from the beginning, however, that the inquiry would be conducted with due regard to s.18 of the Act. That meant that witnesses would be invited to speak under oath or to make an affirmation and that even the one witness, Jim Jones of the Business Day, was required to tell the truth and not to give any misleading evidence.<sup>42</sup> In any event, much of the evidence did not turn on the truthfulness or otherwise of the depositions of

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<sup>42</sup> An allegation that the representative of the African National Congress who appeared before the panel gave false evidence under oath is being investigated.

witnesses and there could be no dispute as to what the papers published, but rather on what constitutes racism.

We observe that there was a remarkable consensus among the witnesses who appeared before us about the fact of racism in South African society and admission, at times that racism was to be found in the media industry. Mr Philip van Niekerk of the Mail & Guardian for example, finds racist slurs hurtful and insulting. He goes on to say that

To the extent that racist sentiments are expressed this is often done in code. Our national discourse is laden with suspicion and distrust. Not even the media is free of this discourse...

Mike Robertson of the Sunday Times contends that

This is a country that institutionalised racism. I have no doubt that the paper I edit continues to reflect that racism...

Peter Bruce of the Financial Mail and John Battersby of the Sunday Independent were among prominent media personalities who conceded to the existence of racism. Two testimonies appeared to deny the existence of racism in their publications. Mr Andries van Wyk of YOU magazine and Ds Mossie van den Berg of Radio Pretoria denied that any form of racism could be found in their publications. Ds van der Berg even went so far as to say that Afrikaners were incapable of being racists because they did not exercise power. There was also the reductionism expressed sharply in Quresh Patel of Midi Televisions' s testimony. His view was that essentially there could be no racism in the media except bad journalism. This is what he had to say

If journalists demonstrate fairness, it is unlikely they can perpetuate or foster racism. Some forms of racism originate because the protection afforded by the simple rules of fairness are ignored. Where journalists break their own rules of fairness, it is easy to understand how racism can creep into the pages of a newspaper, the broadcast of news reports.... If you publish a fair report, it is difficult to see how your report can also contain elements of racism. This is a matter of good journalism, journalists who play by fair rules, can seldom be accused of promoting racism.

Of course there has been this consensus on the existence of racism, but there were differences of opinion about what constituted racism. It is important to state that none of the evidence before us referred to blatant racism as in hate speech. Indeed the initial request by the BLA and ABASA referred to "subliminal racism". Of course, no text on racism that we know of acknowledges subliminal racism as a category of racism as if that is a less nefarious form of racism, somehow tolerable. We need to make it clear that in this inquiry we are examining racism in all its forms and manifestations as found in the newspapers. We therefore do not accept the submission by counsel for "Mail & Guardian" that by mere fact that we used "manifest" we somehow intended to confine ourselves only to blatant or evident racism rather than its subtler manifestation. As a rule this is a distinction which if we were to be directed by, we would not be able to do justice to the objectives of this inquiry.<sup>43</sup>

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<sup>43</sup> In any event, reference has been made above to David T Goldberg that "racism need not be about exploitation in the strong sense of forcing, coercing, or manipulating racial

It is the view of the panel, therefore, that the South African Human Rights Commission, as an independent national institution for the protection and promotion of human rights, must have jurisdiction to consider all matters of human rights violations brought before it. In doing so the Commission will, of necessity, be guided by the jurisprudence of the courts in South Africa, by international common law, and by the treaties this country is party to. The Commission would not be able to discharge its mandate unless it was able to function within the legal and constitutional environment that obtains in South Africa and by comparable international law. These are the tools available to the Commission to protect the rights of South African citizens. Of course, the Commission concedes that while it provides an alternative mechanism for the resolution of disputes that is easily accessible, cheap and speedy, it can only make findings and recommendations. The important point to note is that, in the instance before the Commission, for example, it is doubtful that the aggrieved parties would have had a case to present to the courts. And yet the Constitution provides a median mechanism to bring parties to a place where they could discuss and debate their respective concerns about the exercise of rights. The Commission is at its best when it serves that function.

Anyone aggrieved by such findings and recommendations, has recourse to the courts to challenge the findings and recommendations of the Commission. The Commission serves a useful function as a declarator of rights and as such protects citizens against violations of human rights. The Commission is no substitute for the courts.<sup>44</sup> For that reason, the

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others...” He goes on to say that it is enough that racist acts constitute an exercise in domination with the effect of excluding others on the basis of their race and thus violates their enjoyment of rights due to them..

<sup>44</sup> Reference can be to the judgement of Hlope, ADJP in the Cape High Court matter of *Freedom of Expression Institute v President of the Ordinary Court Martial NO 1999 (3) BCLR 261 at 273*. He stated that a court martial presided over by lay persons who were manifestly devoid of independence could not be considered to be a court within the ordinary meaning of the word. Following *Findlay* in the European Court of Human Rights, he proposed that there should be a right of appeal to a higher court. Unfortunately, the judge did not consider the effect of the right of access to a court in the case of a forum or tribunal such as the Human Rights Commission might be and which does not suffer from the weakness of independence he identified with a court martial.

The matter was also discussed in *Metcash Trading Ltd v CSARS & Ano 2000 (3) BCLR 318* where the Commissioner had the power to enforce payment and such an order could not be suspended by a court of law and then power of the court to provide interlocutory relief was excluded irrespective of the merits or demerits of the case. The court, following the Constitutional Court in *Lesapo v North West Agricultural Bank, 1999 (12) BCLR 1420 (CC)* ruled that this violated the right of access to the court (Section 34). The relevant part of the *Lesapo* judgement reads:

The effect of this underlying principle on the provisions of s. 34 is that any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land.

The court went on to say

The right of access to court is indeed foundational to the stability of an orderly society. It ensures that peaceful, regulated and institutionalised mechanisms to resolve disputes,

Commission avers that it is “competent and obliged” to institute the investigation into racism in the media and to consider all the matters brought before it and to make findings and recommendations in a manner consistent with the Terms of Reference as published.

### **RACISM OR FREEDOM OF EXPRESSION?**

The South African Human Rights Commission has consistently stated that the inquiry was about racism. That means that the primary objective of the inquiry was not so much to deal with the nature and content of the right to freedom of expression including freedom of the media and the press. The Commission wishes to place it on record that by law and the Constitution it is obliged to promote and protect the rights in the Bill of Rights and in the international human rights treaties binding on the Republic of South Africa. The legal argument presented to us consistently makes the point, correctly in our view that there can be no hierarchy of rights. The principle is beautifully captured in the Vienna Declaration and Programme of Action (1993) adopted by the World Conference on Human Rights in June 1993. The Declaration states

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Elsewhere, Vienna says that democracy, development and respect for all human rights and fundamental freedoms are “interdependent and mutually reinforcing”. This formulation was designed to address two menaces to human rights: one, the idea that civil and political rights are more important as rights because they are justiciable and are not dependent on the availability of resources. Two, that somehow history, culture and tradition are sufficient reasons to claim derogation from the full effect of certain rights. It stands to reason, therefore, that there can be no justification for elevating one right above another.

Jurisprudence from the European Court of Human Rights has developed the doctrine of “margin of appreciation”. The doctrine is designed to recognise the political and cultural diversity among contracting state parties to the

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without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principles against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justified.

These judgements therefore indicate that South African law recognises the role of tribunals and forums in the resolution of disputes as long as they do not purport to ultimately remove the jurisdiction of the courts understood as such. The South African Human Rights Commission has never sought to do so.

Convention and as such honouring the principle of state sovereignty while seeking a fair and uniform application and interpretation of the Convention across Europe. The doctrine introduces an element of relativity with variations of emphasis and scope among different contracting state parties. The principles of the doctrine were enunciated in the landmark case of *Handyside* (1976) with regard to the application of the right to freedom of expression. In this case the applicant was the publisher of a handbook which recommended an alternative lifestyle for schoolchildren. The handbook treatment of sexual conduct in particular led to it being proscribed. Applicant alleged that the seizure and confiscation of the book was a violation of Article 10 of the Convention which guaranteed freedom of expression which includes “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” In considering the matter, the Court applied a two-fold test: was the interference “relevant and sufficient” and two, was the interference necessary. The court found that the fact that there appeared to be a groundswell of public opinion against the actions of the publisher indicated that the action was justified. In considering the meaning of “necessary”, the court decided that the expression had to be equated with “pressing social need”. In this case it was the view of the Court that national jurisdiction had to prevail given its proximity to the heartbeat of the nation. In the case of *Muller* (1988) the court found that the action by the authorities of the Swiss Canton of Fribourg in seizing paintings considered to be offensive to the morals of the public was justifiable in that “the interference was prescribed by law and that the aim of limiting the exercise of the applicant’s right was the protection of morals, which the court found to be linked naturally to the protection of the rights of others.”

Article 14 of the European Convention makes provision against discrimination on certain grounds, among them, race. The court has applied a two-step test to determine the justifiability of any discrimination: i) does the discrimination have an ‘objective and reasonable justification’; ii) does the discrimination pursue a ‘legitimate aim’; and iii) is there a ‘reasonable relationship of proportionality between the means employed and the aims to be realised’. It is evident, though, that there have been instances where the court has not been willing to allow the margin of appreciation too much elasticity. In questions of racism and gender discrimination the Court has preferred a narrow margin of appreciation because “the establishment of equality between women and men is ‘today a major goal in the member states of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention” (McDonald: 1993; 120).

The purpose of this discussion at this stage is not so much to engage in the so-called ‘balancing of rights’ exercise, rather it is to demonstrate that all



human rights must be understood and interpreted against their social and historical context.

South Africa is party to a number of relevant international human rights treaties. Among these and those of some relevance to this inquiry, are the

*Universal Declaration of Human Rights (signed 1996);*

*International Covenant on Civil and Political Rights (acceded to in January 1999);*

*International Convention on the Elimination of All Forms of Racial Discrimination*

*(acceded to in January 1999);*

*African Charter on Human & Peoples' Rights (acceded to in July 1996).*

South Africa acceded to the International Convention for the Elimination of All Forms of Racial Discrimination on 9 January 1999. It did so without any reservations.<sup>45</sup> In its instruments of ratification South Africa made a declaration in terms of Article 14 accepting the competence of CERD to receive and consider communications from anyone within the jurisdiction of the Republic claiming to be victims of violations of their rights under the Convention. South Africa also indicated that the South African Human Rights Commission was a body within the Convention which was “competent to receive and consider petitions” from victims who claim violations of their rights. At least on the part of parliament and the government of the Republic of South Africa there is no doubt about the competence of the Commission to “receive and consider” complaints of violations of fundamental rights. As already stated, it has never been the understanding of the Commission that this substituted the authority of the courts.

The application of international law is regulated by ss.231-233 of the Constitution. In particular it states that customary international law is law in the Republic unless proved to be inconsistent with the Constitution and any law passed by parliament. It also regulates how and in what manner international agreements become domestic law unless they are self-executing. However, the courts are enjoined, in interpreting the law, to prefer any interpretation that is consistent with international law. The body of international law has become very expansive in modern jurisprudence. Besides international treaties, the courts may have recourse to the decisions, general comments and recommendations of treaty bodies like the UN Committee on the Elimination of Racial Discrimination (CERD) as well as comparative law. This does not mean that state parties to the treaties can simply shrug off their international responsibilities by saying that a treaty they are party to is not part of municipal law. The state remains answerable and is obliged to implement those parts of the treaty that impose obligations on it.

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<sup>45</sup> That in spite of the advice of civil servants, the objections of opposition politicians like Ms Dene Smuts, MP of the Democratic Party and the fear of some legal academics, *vide* Lene Johannessen: “a Critical View of the Constitutional Hate Speech Provision”; South African Journal of Human Rights, Vol 13 Part 1 1997:135-150 at 146.

In any event, without subtracting anything from the right to freedom of expression, it is worth noting that the issue of racism and racialism has become part of *ius cogens* in international law. *Ius cogens* is a peremptory norm of general international law. Article 53 of the Vienna Convention on the Law of Treaties defines this principle as follows:

For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

It is now widely accepted that the prohibition of racial discrimination has become an imperative norm of the international community (Hannikainen: 1988; 474). There is even a view, though held by a minority of scholars<sup>46</sup>, and arising in part from the declaration that *apartheid* was a crime against humanity, that the international community could consider certain forms of racism to be covered under the principle *erga omnes* meaning that such action was *contra humanum genus* and, as such, nations could take up arms, apply sanctions or such other diplomatic measures as may be appropriate to bring such a state into compliance with the norms of international law.

The inquiry was concerned to examine the nature, content and extent of the right to equality as obtains in the media. This means that the inquiry seeks to address the problem of discrimination on the basis of “race”. For the purpose of clarification we must also include the prohibited grounds of discrimination on the following related grounds: ethnic or social origin, colour, culture and language. A case was made by the Media Review Network that we should consider discrimination on religious grounds to fall under the ambit of the inquiry. More about that later. “Equality” as the Bill of Rights states “includes the full and equal enjoyment of all rights and freedoms.” To address the tautology, it must be stated that equality must mean “the same as..”, which has the same effect given the same or similar circumstances. That means that unfair discrimination occurs when one is prevented from enjoying other rights in the Bill of Rights like the right to human dignity, privacy, freedom of religion, belief and opinion, freedom of expression, freedom of association and other political as well as economic and social rights set out in the Bill of Rights, to give but a few examples. It

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<sup>46</sup> Among these is Prof Vera Gowland-Debbas of the Graduate School of International Law at the University of Geneva in a report on a seminar on the hate crimes and the internet, 1996 submitted to the UN Commission for Human Rights in March 1998 available at the Office of the High Commissioner for Human Rights and made available by author. Elaborating on this development, Prof Gowland-Debbas says: “The prohibition of racial discrimination is now accepted as a norm of *ius cogens*, consecrated in Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties. The International Court of Justice has referred to the prohibition of racial discrimination as an *erga omnes obligation owed to the international community as a whole*. Article 19 of Part I of the International Law Commission’s draft articles on state responsibility has introduced the notion of *international crime resulting, inter alia*, from a serious breach of an obligation of essential importance for safeguarding the human being, such as apartheid” (E/CN.4/997/68/Add.1).

would appear from reading the submissions presented to us that there is no dispute about the fact that racism constitutes unfair discrimination which is prohibited under the Constitution. Unfortunately, we were not presented with argument as to whether there may be circumstances where such discrimination is justified in terms of our law.

South Africa's superior courts have now consistently reminded litigants that the context and circumstances in which South Africa's political transition came about and is being sustained should constantly be borne in mind.<sup>47</sup> In what must have been his last judgement, the late Chief Justice Ismail Mahomed stated that an over-reliance on the personal circumstances of the accused to the point that a disturbingly inappropriate sentence was passed calls for the intervention of a higher court. He said that those circumstances should have been balanced against, *inter alia*,

“the interests and legitimate aspirations of the South African community at a very crucial time in its transition from a manifestly and sadly racist past to a constitutional democracy premised on a commitment to a constitutionally protected and expressly articulated culture of human rights”.<sup>48</sup>

In a strong denunciation of racism, the Chief Justice went on to say (referring to a decision of the Namibian court which he had quoted with approval):

Substantially the same temper should inform the response of South Africa to serious crimes motivated by racism, at a time when our country had negotiated a new ethos and a clear repudiation of the racism which had for so long and so pervasively dominated so much of life and living in South Africa. The commission of serious offences perpetrated under the influence of racism subverts the fundamental premises of an ethos of human rights which must now 'permeate the processes of judicial interpretation and judicial discretion' including sentencing policy in the punishment of criminal offences.<sup>49</sup>

Granted, the Chief Justice here was concerned about what has been called “hate crimes”, criminal actions motivated by racial hatred. The purpose of quoting him so extensively, though, was to demonstrate that in the South African context serious consideration has to be given to the role racism has played in the history of injustice and repression that has been a dominant feature of our social and political landscape for so long. But we should also make the point that that judgement holds whether it refers to criminal actions motivated by racial hatred or, as is our submission, to any form of racism or racial discrimination that falls foul of the law and the Constitution.<sup>50</sup>

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<sup>47</sup> *Vide, inter alia*, S v Makwanyane 1995(2) SACR 1 (CC), du Plessis v de Klerk, NO 1996(3) SA 850 (CC), Brink v Kitshoff, NO 1996(4) SA 197(CC), Prinsloo v van der Linde 1997(3) SA 1012(CC), President of the Republic of South Africa v Hugo 1997(4) SA 1(CC), Harksen v Lane N O 1998(1) SA 300(CC), National Media Ltd v Bogoshi 1999 (1) BCLR 1 (SCA), AZAPO v President of the Republic of South Africa & Others 1996(8) BCLR 1015(CC).

<sup>48</sup> S v Salzwedel, 2000(1) SA 786 at 790H.

<sup>49</sup> *op cit* @ p.792C.

<sup>50</sup> Note what the Constitutional Court said in *President of the Republic of South Africa v Hugo* 1997(1) SA 1(CC):

To the extent that the submissions made to us focused so much on Section 16 of the Bill of Rights which protects freedom of expression, not enough attention has been paid to what is after all the central issue of this inquiry: racism. More specifically, the research and complaints received did not accuse the media of propagating racial hatred which “constitutes incitement to cause harm”(Section 16(2)©).<sup>51</sup> No such allegation was ever made. Both in terms of their original request to the Commission submitted in terms of Section 7 of the Act and in their subsequent submission following the publication of the Terms of Reference and the call for submissions, the BLA and ABASA accused the two newspapers of selective reporting and racially insensitive news coverage. They allege that the “Mail & Guardian” was reporting allegations of criminal actions and misdemeanors of black people in leadership in a distorted manner so as to create prejudice against all black people (our interpretation). Both research projects commissioned by the Commission allege that there were racialised news reporting and racial stereotypes in South African news coverage. So, the allegations before us, we submit, do not fall under the exceptions stated in ss.2 of Section 16 of the Constitution. They are therefore protected speech in terms of our law. Those who seek to limit that right must demonstrate the justification for such limitation by recourse to the limitation clause and other legal principles. Likewise, it must be stated, that those who allege unfair discrimination on the ground of race are in no weaker position by the mere fact that they are accusing the news media of propagating race hatred or incitement to cause harm. In *City Council of Pretoria v Walker*<sup>52</sup> the Constitutional Court refused to make a material distinction between the directness or otherwise of the discrimination. The Judge said:

I can see no reason for distinguishing in this regard between discrimination which is direct and that which is indirect. Both are covered by Section 9(4) and both are subject to the same presumption.<sup>53</sup>

This view has support from the deliberations of CERD which published a General Recommendation XIX on the application of Article 3 in 1995. It stated that the obligation to prevent, prohibit and eradicate all practices of racial segregation should be interpreted to include not only direct actions of

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The prohibition of unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.

<sup>51</sup> CERD made a General Recommendation (XV, Forty-second Session, 1993) on the relationship between Article 4 of the ICERD and Article 19 of ICCPR and resolved:

In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression ...

<sup>52</sup> Per Langa, DP at 1998(3) BCLR 257(CC).

<sup>53</sup> At p.275B (supra).

government but also those of private citizens. It also had to include indirect as well as the unintended by-products or consequences of such actions.<sup>54</sup>

This suggests to us that any human rights violations should be under the spotlight not simply the extreme versions of racial hatred.

An important matter was raised in the *Walker* case. Justice Langa, DP observed that when s. 8 of the *interim* Constitution refers to direct or indirect discrimination, it suggests that the legislators wished to bring within the ambit of prohibited acts not just a direct intention to discriminate but also the consequences of one's action even if the effects were unintended. (at 273F). Elaborating on the notion of intention which appears to be a requirement in the US jurisdiction, Justice Langa ruled that such an onerous requirement was not South African law. This is how he expressed himself:

There is nothing in the language of s. 8(2) which necessarily calls for the section to be interpreted as requiring proof of intention to discriminate as a threshold requirement for either direct or indirect discrimination. Consistent with the purposive approach that this Court has adopted to the interpretation of the provisions of the Bill of Rights, I would hold that proof of such intention is not required in order to establish that the conduct complained of infringes s.8(2). Both elements, discrimination and unfairness, must be determined objectively in the light of the facts of each particular case (278D-F).<sup>55</sup>

This approach, we submit, is also consistent with the definition of racial discrimination in the International Convention on the Elimination of Racial Discrimination. Article 1 states that "racial discrimination" shall mean

Any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which *has the purpose or effect* of nullifying or impairing recognition, enjoyment or exercise, *on an equal footing*, of human rights and fundamental freedoms in the political, social, cultural or any other field of public life (our emphasis).

Given that Section 16 gives no guidance in cases where no extreme forms of racism, or discrimination or propaganda constituting racial hatred are alleged, it becomes necessary to understand how the constitution regulates the relationship between free speech and the right to equality. As already stated, it is a principle of our law that all rights must be understood as reinforcing one another. Any interpretation of rights must be done in order to give the full effect of the rights in the Bill of Rights. The limitation clause (Section 36) affirms that the rights in the Bill of Rights "may only be limited in terms of a law of general application to the extent that the limitation is *reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...*"<sup>56</sup> It remains true that all

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<sup>54</sup> General Recommendation XIX; Forty-seventh Session, 1995).

<sup>55</sup> Given Justice Langa's clear exclusion of the requirement of *intention*, there must be some doubt as to the constitutionality of s.10 of the newly enacted *Promotion of Equality and Prevention of Unfair Discrimination Act, 200 (Act No 4 of 2000)*: "that could reasonably be construed to demonstrate a clear intention to..." may be considered too onerous!

<sup>56</sup> Article 29(2) of the Universal Declaration of Human Rights expresses more clearly both the duty to honour the rights of others and the circumstances where the limitation of a right may be justified. In this regard it states that "... such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of

citizens not only have rights but duties and responsibilities as well. These duties must surely entail respect for the law and honouring the Constitution. It would seem that in terms of Article 19 of ICCPR the right to freedom of expression can be limited in order to ensure “respect of the rights and reputations of others;/ for the protection of national security or of public order, or of public health and morals.” It is evident that freedom of expression is closely connected with the promotion and protection of democratic ideals as well as respect for the rights of others.<sup>57</sup> Following *Sunday Times v UK*<sup>58</sup> this should not merely be a case of making choices between two or more competing rights but that the purpose of the exercise is to give the right its due scope and magnitude without it encroaching on the rights of others. It must therefore be understood that we are not called upon to pick and choose between equality and freedom of expression. The starting point in the present exercise is to give effect to the right to equality. Freedom of expression, narrowly interpreted as the *Sunday Times* judgement enjoins us, limits the right.

Writing about the European system of human rights, Anthony Lord Lester of Herne Hill noted the stark difference between the European and American jurisprudence, namely that “the (European) Commission has upheld race relations and defamation laws imposing civil or criminal sanctions for racist statements as being justified interferences with expression under Article 10(2), on the ground that they are necessary for the ‘prevention of disorder or crime’, or for the ‘protection of the reputation or rights of others.’<sup>59</sup> He goes on to say that in Europe the limitation is done out of respect for the dignity of the individual and concern for the rights of minorities.

In the light of the above, we submit that very little turns on the extreme nature of the racism or violence that is objected to. It remains an infringement of fundamental rights and freedoms. To talk about “hate speech” conjures up this notion of offensive, hate-filled, violent, racist *yobs*. In actual fact, as American academic Eric Neisser has demonstrated, a racial slur or insult is as much a threat of physical violence and may carry as much fear of physical assault as an actual violence does.<sup>60</sup> He suggests that by defining so called hate speech more expansively as including “any expression that insults, disparages, or offends a racial or ethnic group by suggesting either the group’s inferiority or simply others’ hatred of the group” (1994:345), one anticipates the offensive possibility of offensive

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others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

<sup>57</sup> Alfredson & Eide: 1999; 400

<sup>58</sup> The court held that ‘it is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions that must be narrowly interpreted’. Quoted by Lord Lester, QC in *MacDonald*; *op cit*, 470

<sup>59</sup> *MacDonald et al*:1993;473

<sup>60</sup> “Hate Speech in the New South Africa”; *South African Journal of Human Rights*: Vol 10, Part 3 1994, 336-356 at 340.

speech. Such a definition would recognise that there can be no innocuous or harmless racist speech.<sup>61</sup> Speech is action motivated by prejudice. It can be construed as the fountainhead or source of what might become “advocacy of hatred that is based on race, ethnicity... and that constitutes incitement to cause harm” (s. 16(2)).

In the light of these sentiments, therefore, it would be wrong to turn this inquiry into an investigation on freedom of expression. What the inquiry must stick to is to examine racism as the Terms of Reference required it to do. In doing so, however, the Commission will be bound to give full effect to the right and those against whom allegations are made may argue for the limitation of the right or may argue on the basis of the right to freedom of expression. In other words one can avoid the language of “balancing of rights” (without, of course, conceding the correctness of the aversion to the exercise) which has been considered offensive in some of the arguments before us<sup>62</sup>.

We have now reached a stage where the onus in s.9 (5) kicks in. It does so because, there was a general recognition before us that racism was

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<sup>61</sup> The white editors who appeared before us attested to the hurt and pain they felt when they felt unjustifiably accused of racism. An accusation of racism was as much a racist insult to them as the racism felt by those subjected to racism.

<sup>62</sup> We simply reiterate this point because s. 184 read with s. 39 of the Constitution enjoins the Commission, in carrying out its functions, to apply the Bill of Rights. The Commission cannot do so without having regard to the precedents set by the courts of the land and where appropriate balancing the rights. Drawing from the US experience, Prof Daria Roithmayr of the University of Illinois College of Law points out the pitfalls of “balancing of rights.” She states in a communication to the Commission:

One of the difficulties of using rights is the indeterminacy of the balancing process, particularly where a competing right is concerned, but even when the competing interest is not categorised as a right. In the US, of course, we have strict scrutiny which requires that the competing interest be “compelling” and that the racial classification be narrowly tailored to advance that compelling interest. Of course, if the competing interest is classified as a right, it appears to be quite compelling, but it is not clear how to balance two rights against each other., or with what measure a court would attempt to balance. The South African notion of “necessary” and “pressing social need” appears to capture much of the same idea as “compelling interest” and I think it suffers from the same indeterminacy...”

Just to emphasise the point made by Daria Roithmayr the courts have emphasised the primacy of different rights at different times. In *S v Makwanyane*, the Constitutional Court held that the “rights to life and dignity are the most important rights and the source of all other personal rights...” O’Regan, J, in a dissenting judgement, in *New National Party v Government of the Republic of South Africa & Others* 199(5) BCLR 489 (CC) held that “the right to vote is fundamental to a democratic system. Without it, there can be no democracy at all”(at 553). This simply emphasises the point that there can be no hierarchy of rights. Karthy Govender makes the point that: “It is an unprofitable exercise to seek to make a qualitative assessment of rights in the abstract. The value of the rights has to be assessed in its context and by its relevance and importance to our society. At an abstract level, it is very difficult to see why the right to free speech, should always be regarded, notwithstanding the context, as more important than the pivotal rights to equality and dignity” in *Horses for Courses: Understanding the Constitutional Mandate*, to be published in *Obiter* in September 2000.

manifested in the media, in a general rather than in particular or specific ways. Experts like Ms Lynnette Steenveld of Rhodes University demonstrated how, in fact such racism operated. There was no denying that racial stereotypes obtained in the media and whatever canon of interpretation one used, the milieu of much news media reporting does arise from a world view and assumptions about value which draw from the historical prejudices of culture and civilisation which we have imbibed uncritically. We, therefore, make the finding that there is discrimination in the way in which South African news media treat different races. We do not hold that this is done consciously but nonetheless a discerning reader, listener or viewer would notice.<sup>63</sup> The test of *Harksen* comes to our aid here:

...does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend on whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.<sup>64</sup>

Although there was denial of both actual and intended differentiation in the treatment of various groups, yet there was a defence of justification and, critical race theory would say that assertions of colour-blind practice are often forms of denial (1995:127ff).<sup>65</sup> The unique thing about this investigation is that it is not concerned with actions of the state as is often the case in these matters. It refers to the horizontal application of the Bill of Rights as stated in s.9 (4):

No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)....

Does the rationality test apply in these instances?<sup>66</sup> We doubt it. Rationality would most likely take the form of commercial considerations or quality or excellence. How then does one differentiate genuine rationality from mere prejudice? The test of ‘unfairness’, according to *Harksen* “focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.” The impact of the discriminatory action should be judgeable on objective grounds because “it recognises that conduct which may appear neutral and non-discriminatory may nonetheless result in discrimination, and if it does, (objectively judged?!) that falls within the purview of section 8(2)” (Langa, DP in *Walker* at 272F), (our parenthesis). The question that remains to be examined, therefore, is whether such discrimination is fair. The news media has two defences to a charge of

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<sup>63</sup> This has been more fully elaborated upon in the Section III above.

<sup>64</sup> *Harksen v Lane N O & Others* 1997(11) BCLR 1489 (CC) or 1998(1) SA 300(CC).

<sup>65</sup> Gary Preller: *Race Consciousness* in Crenshaw et al: CRITICAL RACE THEORY; 1995

<sup>66</sup> *Prinsloo*, at para 20:

In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.



unfairness in the matter before us. 1) they can have resort to the limitation clause and 2) they can call on the freedom of expression provisions. In his judgement in Harksen, Goldstone, J listed three factors which would assist in the determination of unfairness:

- (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
- (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question;
- (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparatively serious nature.

These factors, assessed objectively, will assist in giving 'precision and elaboration' to the constitutional test of unfairness. They do not constitute a closed list. In any event it is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair.

Applying the Goldstone rule, therefore, we would answer positively to the first ground. Complainants who made submissions on the research data of the experiences of those who have historically been the victims of racial disadvantage and discrimination noted that this was one of the prohibited grounds in the Constitution. Criterion (b) must be considered with the arguments/defence of freedom of expression. Regarding (c) it is worth reiterating that violation of the right to equality often entails violation of the capacity to enjoy other rights, typically, the rights to human dignity, freedom and security of person, privacy, political rights, freedoms of assembly, association, expression, belief and opinion. The Bill of Rights states that "equality includes the full and equal enjoyment of all rights and freedoms" (s.9 (2)). As already stated, "equal", in this instance, must mean "of the same or similar" kind as another. Racial discrimination is a grave affront to the right to equality or as ICERD puts it, it has the purpose or effect of "nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights in the political, economic, social, cultural or any other field of public life."

The inquiry cannot be concluded without examining (b) above and this brings us to the defence of freedom of expression. The Vienna Declaration and Programme of Action (1993) declares that

Underlying the importance of objective, responsible and impartial information about human rights and humanitarian issues, the World Conference on Human Rights encourages the increased involvement of the media, *for whom freedom and protection should be guaranteed within the framework of national law (our emphasis).*

This modern statement on the role and protection to be accorded to the media in a democracy is surprisingly weak. Not only does it give credence to the claw-back clauses, it also emphasises expressions like “objective, responsible and impartial...” which have traditionally been used to limit the scope of the right. In any event, on what basis is objectivity to be judged? The statement is nonetheless useful because it acknowledges that the media has a role in the transmission of information and thus in the construction of democracy based on human rights.

The importance of the right to freedom of expression cannot be over-emphasised. It is particularly significant given the history of South Africa where the dissemination of ideas, the spread of information was so controlled. Contrary to what Hefer, JA<sup>67</sup> has to say about the fact that South African common law had always respected freedom of expression, the truth is that that right was progressively restricted. So, South Africans would, understandably, wish to guard jealously the right to freedom of expression including the freedom of the press and the media. Likewise, one can understand the suspicions about the power of government to control and fears about the process initiated by the Commission. It has become the canon of modern democracies to affirm the fact that freedom of expression lies at the heart of democracy. South African jurisprudence since 1994 has made its own learned contribution to that body of knowledge. Mokgoro J also makes the vital point that freedom of expression must be viewed as part of a ‘web of mutually supporting rights in the Constitution’.<sup>68</sup> The value of this observation lies in the recognition of the mutually reinforcing and holistic understanding of all rights. Freedom of expression is the means whereby free exchange of ideas and the spread of information in society are conducted. By such means the citizenry is better informed so as to be able to make informed decisions about matters that affect their lives. More importantly, they can hold those who govern them to account. Besides it being directed at government, freedom of expression is important because it extends the sphere of knowledge and as such contributes to the search for truth. O’Regan J captures the essence of freedom of expression very eloquently when she says

Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally.<sup>69</sup>

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<sup>67</sup> “Freedom of expression, albeit not entrenched, did exist in the society that we knew at the time of Pakendorf was decided... although its full import, and particularly the role and importance of the press, might not always have been acknowledged” (*National Media Ltd v Bogoshi*, 1999 BCLR 1(SCA) at 12C).

<sup>68</sup> *Case & Another v Minister of Safety and Security and Others; Curtis v Minister of Safety & Security* 1996 (3) SA 617 (CC); quoted by O’Regan J in *South African National Defence Union v Minister of Defence & Another* 1999 (6) BCLR (CC)

<sup>69</sup> at p. 623G supra.

Hefer JA for his part makes the point that freedom of expression serves a social utility, “the vital function of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion” (*National Media Ltd* at 11E).

In South Africa about 13% of the population reads newspapers, all but one title are published in English or Afrikaans and the total ownership of newspapers is in the hands of three media houses: Independent Group, National Media Ltd (Afrikaans), and Times Media Ltd. There are more independent publishers like Nail Media (which publishes “Sowetan”), Caxton (which publishes the “Citizen”) and Mail & Guardian. In recent years there has been a proliferation of independent and community radio stations broadcasting in all South Africa’s national languages. Indeed most South Africans listen to radio whose reach spreads to all corners of the country. The SABC, the national television broadcaster, has been joined by the independent free to air station e.tv and there is also the pay television station, M-Net. The question is therefore raised whether and to what extent, as the custodian of the rights of the people, the courts could intervene to protect rights in an environment like South Africa’s where the patterns of ownership, the exercise of monopolies and the uneven readership patterns, the skewed support by the advertising industry and the fact that so few South Africans are reached by the media. Those who are reached by newspapers and TV are among the better-off South Africans. The large majority of South Africans are silenced.

Earlier on we made two contradictory points. We said that the allegations we heard were not of the sort that could be described as extremist hate speech or propagation of racist violence. At the same time, we noted that all racist speech was prohibited by the Constitution and by law. We went further and asserted that the extremity of the race speech was not necessary for the purposes of our investigation and we adopted Prof Eric Neisser’s broader definition of hate speech. In fact this requires further elaboration. The point is that what may appear as harmless speech or neutral communication in the direct, immediate sense, may upon examination reveal the deeply embedded forms of racism that lurk behind civility. The consequences nonetheless would be as harmful to one’s dignity and self-esteem and, more seriously, they could be the precursor to the more violent expressions of hate propaganda. We therefore accept Goldberg’s notion of a less severe understanding of domination and power.

The right to freedom of speech poses some intractable challenges to the prohibition against discrimination based on race. All true human rights advocates struggle hard with whether and, if so, the extent to which freedom of expression ought to be limited. Ursula Owen, Editor of the British magazine dedicated to fighting censorship, confronts that dilemma. She notes that freedom of speech is the best guarantor for democracy, she understands the argument that says that the best answer to hate speech is

even more open speech which would challenge the claims of hate speech. She shares the fear that there is no evidence that restricted speech like in Germany or the UK has led to a noticeable decrease in hate crimes and that the danger of a slippery slope towards authoritarian control is real. However, she confronts her dilemma:

Though laudable in principle, it is arguable that these views lack force in the face of much twentieth-century history. They perhaps require us to believe too simply in the power of democracy and decency and above all rationality; in the ability of a long, slow onslaught on racism to have an effect; to believe, in the face of so much evidence to the contrary, that there is always progress, however slow. At the end of our century, we have once again in Europe been faced with an outburst of hatred and destruction based on racial and religious differences, which has all but destroyed a country - former Yugoslavia - at least temporarily. It is just half a century since the Holocaust. If that terrifying monument to the dark power of hate speech failed to alter consciousness constructively, what are we to say about the liberal belief in the human capacity to evolve morally?

In the face of such enormities, the political correctness debate has rather muddied the waters, diluting the wider implications of what hate can produce. For the most dangerous threat behind hate speech is surely that it can go beyond its immediate targets and create a culture of hate, a culture which makes it acceptable, respectable even, to hate on a far wider scale. Such a culture of hate is not easy to define and does not necessarily have one trajectory, but its evolution is evident in the circumstances surrounding some events in recent history.<sup>70</sup>

That explains why the European system taking the leaf from ICCPR rather than from the US 1<sup>st</sup> Amendment and subsequent jurisprudence, states that

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation or rights of others....<sup>71</sup>

The right is stated in stronger terms in the South African Bill of Rights even though s. 16(2) makes provision for unprotected speech. It was *Handyside*<sup>72</sup> that bequeathed to posterity the notion that freedom of speech should not just be allowed in fair weather conditions but is applicable

not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'<sup>73</sup>

In determining the latitude granted for the exercise of this right, a greater indulgence is granted in matters of defence against the state as it would in cases involving private citizens.

Usually, the limitation of the right of freedom of expressions comes up in defamation cases. The novelty in this instance is that freedom of expression comes as a defence against a charge of violation of the right to equality.

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<sup>70</sup> "The Speech that Kills"; *Index on Censorship*; 1<sup>st</sup>/98, 32-39 at 36

<sup>71</sup> Article 10(2) of the European Convention of Human Rights

<sup>72</sup> *Handyside v UK* (1976) 1EHRR 737

<sup>73</sup> Quoted in MacDonal *op cit*, 470.

Defamation cases though litigated under common law and there are common law defences, but they are principally designed to protect the right of another to dignity and privacy.<sup>74</sup> It has also been stated that greater latitude is accorded to political speech than otherwise because the public has an interest in the performance of public representatives and in their fitness for public office.

In his judgement, Hefer JA has sought to strengthen the right to freedom of expression by removing the requirement of *animus injuriandi* that had been enunciated in *Pakendorf* and had almost assumed the status of trite law in South African common law. Hefer JA judged that strict liability would not serve the interests of democracy in the new South Africa and could stifle the press in its duty, the so-called “chilling effect”. He concluded that

.... the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon consideration of all circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.<sup>75</sup>

By removing the test of strict liability, the court nonetheless requires proof that publication was “reasonable”, that is, that it was reasonable to publish particular facts at a particular time. The onus of proof resides with the defence.

The final matter for consideration is what effect, if any, considerations of purpose and necessity would have on the right. In South Africa the purpose must be whether the limitation would prevent or avoid “imminent violence” or counter “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm” (s. 16(2)(b) and (c)). The difficulty, of course, is that the imminence of violence cannot adequately be judged until the offending matter is published. Dr Ibbo Mandazza, a publisher of one of the journals that was banned by the government of Zimbabwe not so long ago and the editor arrested, pointed this out. The accusation was that publishing false information about the death of Zimbabwean soldiers in the DRC conflict, and heads without bodies and secret burials of servicemen, was likely to cause alarm and despondency, chuckled that as the story was published six months before, there was no evidence that any “alarm and despondency” had been caused. Therefore the charge was patently false.

The social purpose of freedom of the expression has been emphasised in the written papers before us. In particular the statement by Joffe J in *Government of the Republic of South Africa v “Sunday Times” Newspaper and Another 1995(2) SA 221 (T)* is quoted with approval:

The role of the press in a democratic society cannot be understated.... It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and

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<sup>74</sup> See the judgement of Corbett CJ in *Argus Printing and Publishing Co Ltd and Another v Esselen’s Estate 1994(2) SA 19(A)* and quoted by Hefer JA in *National Media Ltd, op cit* at 10E

<sup>75</sup> at 14B *op cit*

inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern.<sup>76</sup>

The limitation clause no longer includes the condition of necessity that was in the interim Constitution. It now simply states that it must be “reasonable and justifiable”. Lord Lester QC states that to limit the right to freedom of expression, the state only needs to establish ‘a pressing social need’. It would seem that in this case the media under attack for racism could call on the defence of ‘pressing social need’.

*The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000* enacted earlier this year has not yet come into effect. The Act should ameliorate the dilemma that South Africa presents. Section 10 of the Act, however, places an onerous burden on those who will seek protection under it. What we have then in South Africa, it seems, is a right to freedom of expression that is virtually unassailable. The *Bogoshi* dictum of doing away with strict liability virtually insulates the media against attack and the Act makes it virtually impossible to seek an effective remedy against hate speech. The South African courts have not had the opportunity to consider the effect of this contradictory state of affairs: two unreconciled wings of public policy.<sup>77</sup> It is our view that the *Equality Act* may be open to constitutional attack.

Before we conclude, it is necessary to recall that we held back on finality in a matter we raised earlier regarding the appropriateness or otherwise of the submissions by the Media Review Network. The MRN has made extensive research available to the panel. Their research was very well documented. The assertion they make is that South African media consistently stereotyped adherents of the Moslem religion by association with violence or terrorism. They charged that the South African media limited responses through Letters to the Editor which made that avenue of refutation less valuable than it might have been. The Chair of the panel raised the question as to whether this inquiry was the appropriate place to raise the concerns uppermost in the minds of MRN. That arose in part because the witnesses from MRN and the statistics provided emphasised the non-racial character of Islam and that the religion had adherents among all races in South Africa. In response the MRN made a further submission to justify why their concerns should be considered under racism. Although s. 9 of the Constitution mentions religion as one of the prohibited grounds of

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<sup>76</sup> Quoted in *National Media Ltd* at 10BC.

<sup>77</sup> We are unable to agree with Lene Johannessen: 1997, op cit p148 who says that

The Canadian experience shows that it is possible for a country with a constitutional order similar to that in South Africa to limit racially offensive speech by a considered use of the general limitation clause. As the Canadian example shows, hate speech provisions can be held justifiable at the limitations stage even though the content-neutral approach adopted by the Canadian Supreme Court encompasses all forms of hate speech. Even those countries which adopted some form of internal limitation to their constitutional freedom of expression protection have not done so by granting total immunity to constitutional review.

discrimination, it was the view of the Chair that religion does not automatically translate to racism. This assertion will have to be demonstrated. ICERD significantly does not include 'religion' as one of the grounds for racial discrimination. We, however, hold that the submission was appropriate because clearly, notwithstanding the representation made by MRN, the Islamic religion in South Africa is associated with people of Asian descent. It has therefore been very easy to stigmatise Islam by association with Arab terrorism. The fact that PAGAD activists in the Western Cape frequently dress in Palestinian scarves, gives vent to the idea that the religion is associated with a particular race. It was therefore appropriate to allow the MRN submission in an inquiry on racism in the media.

## SECTION V

### OBSERVATIONS, FINDINGS AND RECOMMENDATIONS

In this concluding section of the Report it is appropriate to attempt to pull together the various strands, not by way of summary but rather by way of general observations, findings and recommendations. From the time that the inquiry was announced, the Commission has received numerous written submissions, heard the evidence of a substantial number of witnesses, been placed in possession of various ideas and suggestions with regard to dealing with racism in the media, addressed many meetings, spoke to a large number of people concerned about the media and read volumes of submissions and publications. Some journalists spoke to us under the protection of anonymity. Following the public hearings and the testimony by editors, a number of journalists approached the Commission seeking to put another side of the situation in their newspapers. Among these were e.TV, Sunday Times, Cape Times, and Sunday Tribune. We are indebted to all those who took the time and effort to become involved in this important process. It is accordingly important that we are able to bring this part of the inquiry to a close and we hope that the observations, findings and recommendations that follow provide a useful point of reference for future initiatives.

It was agreed prior to the commencement of the hearings that there would be no findings in respect of individual journalists, publications or titles. We intend honouring that agreement. There has, of course, been criticism of the Commission by black editors and some journalists for coming to such an agreement. It is feared that such an imposition was designed to hamstring the outcome of the inquiry from the start. Our view is that the manner in which the inquiry was conducted, in any event, does not lend itself to the making of such individual findings.

On the other hand it was never envisaged that no findings would be made. It would be a gross dereliction of duty for the Commission, in the face of all the evidence and submissions that it has considered, not to make any findings or recommendations. This was certainly the contemplation of the Commission and most of the parties that came before the Panel. Consistent with the powers and working methods of the Commission it is necessary to locate those observations, findings and recommendations within the terms of reference of the inquiry.

We offer these observations and findings in the spirit of the Terms of Reference and the public hearings. We believe that the inquiry into racism in the media understood holistically was an exercise in public accountability. It is because we affirm the right and duty of the mass media



to subject public representatives to scrutiny, that they too, their policies and practices should be put under the microscope. Accountability does not threaten press freedom, as a number of the legal opinions sought by various organisations and agencies proved. Ultimately, the authority and integrity of the media will be enhanced by the extent to which media organisations and practitioners subject themselves to scrutiny as they themselves do.

The observations and findings we present are of a broad nature. They are designed to contribute to an improvement in how the media deals with racism. To this end the approach is consistent with the non-adversarial manner in which the Commission sought to conduct this inquiry. We accordingly trust that these observations, findings and recommendations are received, debated and hopefully implemented in that spirit.

## **OBSERVATIONS AND FINDINGS**

1. To the extent that expressions in the South African media “reflect a persistent pattern” of racist expressions and content of writing that could have been avoided, and given that we take seriously the fact that many submissions complained that such expressions cause or have the effect of causing hurt and pain, South African media can be characterised as racist institutions (Goldberg:370). This finding holds regardless as to whether there is conscious or unconscious racism, direct or indirect. The cumulative effect of persistent racist stereotypes, racial insensitivity and at times reckless disregard for the effect of racist expressions on others, amounts to racism.

**We urge SANEF and the Institute for Advanced Journalism to offer racism awareness training for journalists at all levels of the industry. We believe that this report will be a valuable resource for discussion and debate.**

**We encourage editors to organize newsroom discussion groups from time to time with a view to sensitizing journalists to the manner in which racism creeps into their copy.**

**We advise schools of journalism and media studies at universities and technikons to consider a module on racism in the media in the academic training of journalists and media workers.**

2. Having found that racism exists in the media, we go on to state emphatically, that racism cannot and must not be equated simply with bad journalism. What makes for bad journalism is hardly ever the racist content or effect of a particular copy. It is true that double-checking on sources, might ensure a more balanced presentation of the issue but failure to do need not amount to racism. We are concerned that a too

easy resort to an explanation of bad journalism, might be another form of evasion and denial of racism.

3. We draw attention to institutional and structural forms of racism. The Commission did not undertake an examination of staff levels and how various race groups are represented. We note that many companies are complying with the employment equity plans required by the Employment Equity Act, 1998. We believe, however, that much racism occurs at the institutional or structural level. It occurs as historical reliance is made on commonsense methods and systems without interrogating what messages these conveyed about the cultural diversity of our country, about the history of inequality and about the dominant knowledge systems that create a unipolar view of the world.

**Exposure of journalists to the cultural diversity that forms the fabric of our society should be promoted. There are many agencies in our country that organize “plunges” and trans-cultural dialogues. These would help all South Africans understand and appreciate the value of cultural diversity in our country.**

4. Generally speaking, we have found no evidence of the mainstream media indulging in blatant advocacy of racial hatred or incitement to racial violence. We have found much evidence of condemnation of hate speech. We have also found, increasingly, appropriate reporting of race crimes in our country. We wish to draw attention to the fact that, contrary to the view widely expressed before us, the fact that a particular piece of writing does not fall within the ambit of s.16(2) does not mean that it is not a violation of the Bill of Rights, especially for our purposes, with regard to the right to equality and human dignity and self-esteem. We include here the freedom of conscience, religion, thought, belief and opinion. All it means is that the defences and limitations of the right applicable in terms of the Constitution come into play. In other words, the fact that speech does not fall under s.16(2) does not mean that otherwise freedom of expression allows a gratuitous violation of rights.

**It is recommended that a body like the Institute for Advanced Journalism should conduct regular workshops on the impact of s. 16 of the Bill of Rights and Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 on the prohibition of racism and the promotion of equality and human dignity.**

5. We confirm what many observed during the hearings, that the self-regulating mechanisms are not effective. We noted that although the BCCSA alludes to racism as being objectionable, the IBA refrained

from mentioning racism in its Code of Conduct for Broadcasters; the Press Ombudsman did not believe that racism was a concern in the press. Part of the reason for this is that very few newspapers attested to placing our Constitution and Bill of Rights at the center of their professional consciousness and responsibility. Again and again, we were told that no formal training on the Bill of Rights was available to new recruits and no check on the application of the Bill of Rights to the work of journalists was encouraged. There was also wide recognition that the Code of Conduct of the Press Ombudsman needs to be tightened. The voluntary nature of subscription to the Codes has meant that institutions like Radio Pretoria do not fall under the ambit of BCCSA, for example. The fact that present monitoring frameworks are only re-active and no investigation can be conducted at the instance of the self-regulatory body, is a serious flaw in the current system.

**Mindful of the fact that we were strongly urged not to propose any measures that would restrict press freedom, or encourage the government or parliament to legislate against the media, we believe, nonetheless, that SANEF should convene a study and/or conference on media freedom in South Africa or initiate a pilot project on effective monitoring and accountability of the media in South Africa within the context of the Constitution. We believe that such a study could consider whether the Independent Communications Authority's (ICASA) Code of Conduct and monitoring mechanism would not be usefully applied to the print media as well. Alternatively, we are of the view that a regulatory framework that uniformly addresses all the media; that sets a framework and an independent regulatory authority solely under the control of and funded by the media: publishers, investors, editors/journalists, readers/civil society and other media workers, may be of benefit. In other words, what already exists should be strengthened and established by legislation.**

6. During the course of the public hearings, we had reason to note that many of the submissions made to us expressed fear. It was feared that the outcome of the investigation would lead to curbs on press freedom. FXI sought to persuade us that there were in fact sufficient mechanisms in place currently to render such an eventuality unnecessary. We do not believe that our democracy can thrive in a climate of fear and suspicion. We believe that all who have interest in human rights would recognize that a totally unregulated system, with weak self-regulation, would ultimately undermine the integrity of the media. Public scrutiny is good for the health of the media in a democracy.

**It is recommended that there be ongoing public debate about the role and responsibility of the media in a democracy. Such a debate commenced during the course of the hearings, should continue. The media, training institutions and the South African Human Rights Commission should play a leading role in continuing the debate.**

7. There were differing views on the role and target of individual publications. Some saw themselves as attempting to be relevant for all South Africans, while others saw a need to reach out and pitch to a defined target audience. Notwithstanding this difference, it is clear that, with few exceptions, there was a need for greater diversity both in terms of the market and of the staff. Of particular concern was the small number of Black sub- editors and women in senior management positions.

**It is recommended that both formal and non-formal training institutions, as well as the media management, vigorously address the issue of the training and recruitment of black staff, especially sub editors. An aggressive recruitment and training campaign with clear time frames - matched by appropriate in-house training and mentoring is recommended. The media should strive to ensure greater representivity in the newsrooms through recruitment and training in accordance with the letter and spirit of the Employment Equity Act. The South African Human Rights Commission will monitor this by examining the equity plans of media industry.**

8. Most of the print publications are owned by a small and limited group of publishing houses. This concentration of ownership can stifle media diversity and prevent the media from properly reflecting the whole South African reality. Even where editors enjoy acceptable levels of editorial independence, it is found that greater diversity in ownership is consistent with achieving a greater diversity of views and opinions. Diversity in ownership will also ensure that the objective of having a representative media is achieved.

**It is recommended that the current attempts to establish the Media Diversity Agency be given greater impetus. The private sector should be encouraged to support such an initiative and if necessary funding and support should be made available by both the government and the private sector to promote and encourage greater diversity in ownership. This is consistent with the Declaration of Windhoek which supports a pluralistic press**

**defining it as...” the end of monopolies of any kind and the existence of the greatest possible number of newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community. “**

9. Diversity in language is almost non-existent in the print media, effectively limiting access by non-English and Afrikaans readers. We have noted that *Ilanga* is the only newspaper publishing in African indigenous languages. We noted the demise of the historical Eastern Cape Xhosa newspaper, *Imvo Zabantsundu*. There is a need to ensure that the representativity referred to includes the essential element of language. This challenge of diversity is to be seen as part of the broader challenge of transformation which the media faces and which it is engaged in dealing with.

**It is recommended that the Media Diversity Agency and other agencies involved in attempts to diversify the media consider the issue of language diversity as part of the broader thrust of achieving a diverse media. In this regard the views of the Pan South African Language Board on the matter should be solicited. In addition it is recommended that current media give consideration to the use of an alternate language in conjunction with the main language in order to broaden access. An example might be a column written in Zulu in the Daily News.**

10. Voluntary Codes of Conduct have become a useful tool for the media in developing and maintaining an acceptable standard of reporting and analysis. The differing understandings of racism and its manifestations reflected during the hearings underpinned the need for the development of a Code of Conduct. Such a code should deal with reporting on race issues but should not necessarily be confined to it. It could cover more generally human rights reporting.

**It is recommended that the current Codes of Conduct and various declarations that exist be reviewed in the light of these hearings and this report, to ensure that they are consistent and in line with the current constitutional requirements and that they properly reflect the role of the media in a democratic society. It is recommended that SANEF consider initiating such a process.**

11. In house training for journalists and other media professionals is largely uncoordinated and dependent upon the particular media institution's

policy, capacity, commitment and resources. The result of this is varying standards in respect of knowledge, skills and ethics. We have noted that editors applied varying standards to readers' complaints. Some promote debate in their letters' columns; give space to readers' objections. In some newspapers there is not sufficient and clear distinction between views and opinions as against news. This public/readers need to know clearly what they should expect from their editor should they be concerned about accuracy or an opinion expressed in a newspaper column.

**It is recommended that consideration be given to the establishment of cadet training programmes for aspirant journalists that would not only address issues such as professional standards and ethics but also to ensure that an understanding of the Constitution and human rights was integrated into the training received. The various media houses, professional bodies such as SANEF and other formal and non-formal training institutions could consider the further implementation of this recommendation.**

Ends

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18 November 1999

The Editor

Cape Argus

Newspaper House

122 St. Georges Mall CAPE TOWN 8001

Dear Editor,

RE: INQUIRY INTO RACISM IN THE MEDIA

The South African Human Rights Commission, during its plenary meeting of November 1998, formally resolved to conduct an inquiry into racism in the media. The Terms of Reference for the inquiry are included in the Interim Report a copy of which is attached to this letter.

In response to its request for the receipt of submissions, the Commission received several written submissions. Some of them, while valuable in themselves, were not directly relevant to the inquiry and are not included in the Report. The Commission also commissioned researchers, namely Ms Claudia Braude and the Media Monitoring Project (MMP) to undertake research on its behalf. The submissions received as well as the research commissioned provide, on the one hand, general information on the role of the media, current trends in reporting and the perceptions and views of the authors of the submissions as well as the researchers on the matters, failing within the terms of reference. On the other hand some of the submissions as well as the research are more specific and contain allegations and assertions directed against and in respect of specific media.

In keeping with the Terms of reference we deemed it appropriate to make available to you both, a copy of the Interim Report of the inquiry (which report includes the research conducted by Ms Braude and the MMP) as well as those submissions received which are relevant to you or which may adversely affect you. These are enclosed herewith. In compliance with the Terms of Reference you are now afforded an opportunity to respond in writing to those aspects of the report and the submissions, which implicate you, and any other aspects thereof. If you elect to respond, your response must please reach us within 30 days from the date of receipt hereof.

Kindly note that the enclosed report and submissions are embargoed until 9h00 on 22 November 1999.



Yours faithfully.

MC MODDLIAR  
HOD - LEGAL Department.

Encl. Interim Report

# **BOARD NOTICE 16 OF 1999[BrdN16y1999]**

## **South African Human Rights Commission**

Terms of Reference for investigation into racism in the media

### **A Definitions:**

"Act" refers to the Human Rights Commission Act, 1994 (Act No 54 of 1994);

"Constitution" refers to the Republic of South Africa Constitution Act, 1996 (Act No 108 of 1916);

"Chairperson" refers to the Chairperson of the South African Human Rights Commission or a person designated by the Chairperson.

### **B Terms of Reference:**

1. To investigate the handling of race and possible incidence of racism in the products of the media and whether such racism as may be manifested in these products constitutes a violation of fundamental human rights as set out in the Constitution.
2. To establish the underlying causes and examine the impact on society of racism in the media if such racism is found to be manifested in the product of the media.
3. To make findings and recommendations as appropriate.

### **C Procedure:**

1. The investigation will be conducted in terms of the procedure published in Government Gazette Number 17457 published in Government Notice 1465 dated 4th October 1996, read with special procedure set out below.
2. Within 14 days of the publication of this Notice, the Commission will cause to be published in any manner that the Commission may deem necessary, invitations for submissions from any interested parties including institutions, organisations and individuals.

### **Invitation for Public Submissions**

3. The submissions should be in writing and must disclose the name, address and other contact details of the deponent. Anonymous submissions will not be entertained. Where, however, the deponent does not wish to have her/his name published, the Commission will respect that wish. Confidential submissions, however, having regard to the rules of natural justice, may not necessarily be accorded the same weight as public submissions. Submissions must be submitted within 30 days of publication of the invitation referred to in Paragraph C2 above.
4. In order to make the process as inclusive as possible, members of the public may request to make their submissions to the Commission under oath in camera. Commissioned Research
5. The Commission may undertake or commission research, which may assist in providing information or data, social analysis or methodology for the investigation.

### **Analysis and Evaluation**

6. The Commission will analyse the submissions and the research in order to determine trends and any prima facie allegations of violations of fundamental human rights. Note will be taken of proposals for the further conduct of the investigation and suggestions about how best South Africa can achieve the elimination of all forms of racism and racial discrimination.

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7. An interim report on the research, submissions and evaluation and analysis of the information and data submitted, as well as the data themselves, will be made available upon request. Those institutions, corporate bodies, organisations and individuals who may have an interest in responding to any part of the interim report will be offered an opportunity to do so in writing. Responses must be received within 30 days of the release of the report.
8. The Commission will thereafter evaluate the responses and invite specific individuals, corporations or institutions to make oral submissions and give testimony at Public Hearings.
9. The time and place of these Public Hearings will be published in the Government Gazette

### **The Panel**

10. Pursuant to the provisions of the Act, a panel will preside over the Public Hearings. The Chairperson of the Human Rights Commission, or a person designated by the Chairperson, will chair the panel. The panel will consist of at least three persons. Among the panelists, the Chairperson may invite one or two persons with expertise in racism and/or the media.
11. All submissions before the panel will be made under oath or affirmation. The rules of natural justice will apply. Witnesses will be entitled to legal representation. Argument on points of law or of fact may be addressed to the panel.
12. In conducting the inquiry, the Commission will have recourse to the provisions of Sections 9 and 10 of the Act.

### **The Report**

13. The Chairperson and members of the panel will prepare a final report on the Inquiry in terms of Section 15 of the Act. The report will take due notice of all submission, allegations, responses, and points of law and of fact. Following an analysis of the evidence submitted, the panel would make Findings and Recommendations.
14. The final Report of the Inquiry and the findings and recommendations will be made public.

DATED at JOHANNESBURG this 1st February 1999  
South African Human Rights Commission  
Entrance 1, Wilds View  
Isle of Houghton  
Boundary Road  
Parktown  
2198

(12 February 1999)

**Government Gazette No. 19809 - Vol. 405 - 2 March 1999[GGN19809]  
GENERAL NOTICE  
SOUTH AFRICAN HUMAN RIGHTS COMMISSION  
NOTICE 353 OF 1999[GenN353y1999]  
INVESTIGATIONS INTO RACISM IN THE MEDIA: CALL FOR  
SUBMISSIONS**

**The South African Human Rights Commission is conducting an inquiry**

- 1) To investigate the handling of race and incidents of racism in the media and whether such racism as may be manifested in the media constitutes a violation of the rights to equality and dignity set out in Section 9 of the Constitution (Act No 108 of 1996).
- 2) To establish the underlying causes and examine the impact of possible racism in the media on society.

The South African Human Rights Commission hereby calls for submissions on this topic from individuals, organisations and interested parties. All submissions must be in writing and where reliance is placed on any document, image, tape recording or video footage, a copy should be annexed or sufficient details provided to enable the Commission to retrieve the material.

The name, address and contact details of the submitter are required in respect of Every submission. A party wishing not to have his/her name disclosed should indicate this wish.

Submissions must reach the Commission no later than March 30 1999. Persons requiring assistance in making a written submission should contact Robert Nkuna at the South African Human Rights Commission.

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Submissions must be submitted to the South African Human Rights Commission offices at the following address:

Physical Address:

Entrance 1, Wildsvief, Isle of Houghton, Boundary Road, PARKTOWN  
Postal Address:

## STATEMENT ON THE INQUIRY INTO RACISM IN THE MEDIA

**The South African Human Rights Commission this morning resolved to withdraw the subpoenas served on a number of newspaper editors and media personnel recently. Following meetings with the South African Editors' Forum on Monday 21 February and a group representing newspaper proprietors on Friday 25 February, the Commission was requested to withdraw the subpoenas. Acting on this request and aware that the subpoenas obscured the central issue that the Commission had set out in the Terms of Reference for the Inquiry, the Commission considered the issue of the subpoenas this morning. While the Commission believes that the subpoenas were necessitated by the attitude of many newspaper editors and that the Commission acted within the law in issuing them, it believes that the time has now come to create an environment where cooperation can be assured.**

The Commission has noted that the meeting with newspaper editors and proprietors marked an advance on the initial objections to the Inquiry. It was now accepted that the Inquiry was not an attack on freedom of expression and freedom of the press. It was also agreed that the Commission was acting within its mandate in issuing the subpoenas. All parties accepted that the media had a role in generating informed public debate on the issue of racism in society, in being vigilant about how racism is being constructed in the media and in assisting with the eradication of racism in society.

For these reasons, the Commission believes that enough common ground has been identified. The Commission accepts the bona fides of the newspaper proprietors and SANEF and is thus willing to take up the offer to "urge" the editors to cooperate with the process initiated by the Commission and to create an environment where these issues can now be addressed.

The Commission appreciates the cooperation offered by some editors in the process and subpoenas issued to them are hereby withdrawn. The Commission will assess the situation on Wednesday 1 March 2000 to consider the response of the other newspaper editors and whether any further action was necessary. The Commission reserves the right to reinstate the subpoenas should such be warranted. Notwithstanding this development, the Public Hearings will be held as scheduled on Wednesday 1 March 2000. The Hearings will proceed according to the provisions of the Sections 9 and 10 of the Human Rights Commission Act, 1994 and the Terms of Reference already promulgated.

The Commission is anxious that the central purpose of the Inquiry into Racism in the Media should not be lost sight of. The issue is the challenge

South Africans have to face of eradicating the persistence of racism in our society with its resultant violation of the right to human dignity, and equality as well as the need to uphold freedom of the press so necessary for the construction of a vibrant democracy.

Johannesburg  
28 February 2000

# **SOUTH AFRICAN HUMAN RIGHTS COMMISSION**

## **INQUIRY INTO RACISM IN THE MEDIA**

### **Introduction**

1. The South African Human Rights Commission has been undertaking an investigation into racism in the media since November 1998 when the announcement was made. Since then, the Terms of Reference were published in the Government Gazette (Notice No 19740 dated 12 February 1999). The Notice sets out the objective and procedure for the investigation. The purpose of the inquiry is stated as follows:

To investigate the handling of race and possible incidence of racism in the products of the media and whether such racism as may be manifested in these products constitutes a violation of fundamental human rights as set out in the Constitution;

To establish the underlying causes and examine the impact on society of racism in the media if such racism is found to be manifested in the products of the media;

To make findings and recommendations, as appropriate.

2. The Commission accordingly invited public submissions on the subject of the inquiry and commissioned research. The interim report, made up of the submissions and the commissioned research, was published in November 1999. Following publication of the interim report, the Commission submitted the report to a large number of newspapers for comment and response. Many of these were cited in the submissions or in commissioned research reports. By letter dated 11 January 2000, we also invited other role players to make submissions to us. Among them are media publishers, statutory bodies like the IBA, the Advertising Standards Authority and the Press Ombudsman as well as professional bodies of journalists, research/academic institutions and other related role players. Our letter of invitation states in part:

We would appreciate it if you could share your insights into the operations of the media especially how the problem of race is reflected in the media. In addition, we would value any recommendations as to how the media can play a role in the construction of a society free of racism. Your insights into the exercise of freedom of expression and the press in a democracy where the problem of racism is thriving will be appreciated.

We are pleased to report that many of these have responded positively.

3. Since this inquiry was announced, the Commission has held meetings with many editors and journalism in formal and informal settings. We have responded diligently to all inquiries on this investigation and we have made ourselves available to speak to a number of bodies that invited us to address their meetings on this matter. We did so because



we believed that it was important to address the issues that are the subject of the inquiry, to allay fears and to seek cooperation.

4. Paragraph 12 of the Terms of Reference as published makes clear that

In conducting the inquiry, the Commission will have recourse to the provisions of Sections 9 and 10 of the Act.

The Commission, therefore, has consistently made it clear that should it be necessary in its opinion to issue subpoenas, it reserved the right to do so. In keeping with our commitment to avoid singling out a few journals or newspapers but to undertake a general investigation, the Commission decided in February to issue subpoenas to a number of newspaper editors. In any event, by that time, it had become clear to us that many of them were not willing to assist the Commission with this inquiry to any extent. Responses to our letters were at best dismissive and cynical but even worse, some were downright rude. In some cases we had been in correspondence with their legal representatives and all outstanding matters could only be resolved by the Commission being given the opportunity to consider the issues and making a finding in the context of an inquiry where all evidence would be evaluated. The subpoenas are intended to secure attendance at the Hearings and to ensure that those subpoenaed know precisely where to go and the information required of them. The subpoena is directed at potential witnesses who have information necessary for the resolution of an issue at hand. It is not an indictment. Not everyone we subpoenaed had been uncooperative. Nonetheless we believed that it was correct to issue subpoenas in order to avoid the implications that the subpoenas were merely punitive.

### **The Issues**

5. In 1998, the Black Lawyers Association and the Association of Black Accountants invited the Commission to conduct an investigation into racism into newspapers as empowered by Section 7(1) of the Act. Having submitted the detailed request to the newspapers concerned, and having considered the detailed legal submissions of the lawyers, we resolved that
- i) it would be inappropriate to conduct an inquiry into just two newspapers where it was evident that the issue of racism was more pervasive, far-reaching than the submissions indicated;
  - ii) the request was in fact an invitation to undertake a more in-depth investigation into racism and how it manifests itself in the media; and therefore that
  - iii) we would conduct an in-depth investigation into racism in the media.

Accountability of the media to readers, viewers and listeners is key to giving credibility to the media and to giving the public the feeling it can trust the information it receives. Without credibility, journalists will not be trusted; if not trusted, journalists cannot fulfil their mission to inform people about what the

powerful are doing and failing to do. Accountability is uncomfortable for journalists. In their reluctance to submit themselves to such accountability, journalists are no different from politicians, lawyers, and the military or any other group that exercises power. Yet, the obligation for journalists to accept scrutiny is special because scrutiny is the sanction they hold over others. All journalists' organisations need to challenge the unavoidable reluctance of their members to become subject to a system of public scrutiny that actually works.

- *Bettina Peters; IFJ, 1997:160*

6. The Commission has been aware both from the pattern of complaints it received and investigated, from media reports and aware of the history of South Africa, that racism was an issue South Africans needed to grapple with. We were concerned that all discussions and debate about racism was by and large negative, defensive and uninformed. We believed that an inquiry of this nature would help South Africa take serious account of racism, acquire tools and language for dealing with the issue and develop counter mechanisms, remedies and strategies to combat racism.
7. The Commission acknowledged that the media were a very influential public institution. It was vital in ensuring an informed public, raising awareness about the issue and could help to combat the negative stereotypes that we bring with us into the new South Africa. The Commission is also conscious of the potential for negative influence that the media has of sensationalising these matters, feeding on the racial prejudices that exist in society. The purpose of this exercise was to seek partnership with the media by assisting those responsible for copy to understand how racism manifests itself in their work sometimes unconsciously, how media products are likely to be received by those affected. It is important to understand how media products are affected by culture and experience and how language can have a variety of meanings which could cause hurt and harm and violate another's human dignity and right to equal treatment. As consumers of the media we are often conscious of such inadequacies in the South African media. The reasons for that may be multifold: employment practices, patterns of ownership and monopolies, diversity and representivity. All this should be the subject of the inquiry.
8. The central issue for this inquiry, therefore, is racism. But this right to equality and to human dignity must be balanced against the right to freedom of expression which includes "freedom of the press and other media"(Section 16 of the Constitution). It occurs to us that respect for human dignity can best be realised in an environment where free expression of ideas is encouraged and freedom of the press is guaranteed where everyone is ensured human dignity. There is no freedom to violate another's humanity or to discriminate against another in the name of freedom of the press. We are not aware that our courts have yet

determined this careful balancing of these two rights. As a result much of the commentary on the inquiry has assumed that the freedom of the press is absolute except the limitation in subsection (2) relating to hate speech. The inquiry will encourage sensitivity to the duty to hold all rights in tension. This cannot be done without some inquiry into current media practices in order to assess properly the failings of current journalistic practice. Guidelines and recommendations could help develop the kind of vibrant and free press that broadly reflects the mind of all of South Africa.

9. The independence of the Commission must be respected. The Paris Principles assert that central to the exercise of independence by national institutions, is their operational independence. That means the capacity to set priorities and take decisions without undue influence from factors outside of the Commission itself. In other words, the Commission must at all times be free to make its decisions on the basis of its duties and powers, without fear or favour. It is evident that a campaign is underway to put undue pressure on the Commission to tamper the legitimate exercise of its judgment. That is as unacceptable when it is done by government as it is when done by any other powerful institution like the media. This campaign of vilification of the Commission by some newspapers is uncalled for and is designed to undermine our democratic institutions. The media should ordinarily be the defenders of these institutions and not simply be the protectors of their unwarranted privilege.

### **Conclusion**

10. Some newspaper editors have responded to the inquiry and the subsequent issuing of subpoenas in a negative and hostile manner. It is evident to us that many of them have not seriously considered the issues this inquiry raises, or that they are not interested or capable of understanding them. They seem eager to see threats to the freedom of the press even where none exist. The effect of this is to cloud the real issues, one that they would rather not confront, namely, racism. This is a characteristic strategy of avoidance and denial.

11. More seriously, many appear to believe that freedom of the press translates to being above the law and unaccountable. That cannot be allowed to prevail. The Constitution states clearly that

This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

In addition, the Constitution states that the Bill of Rights is applicable, where appropriate, to natural and juristic persons (Section 8).

12. Finally, newspaper editors, in particular, must note that when they flagrantly violate the law by refusing to abide by a legally binding subpoena, they do not just become martyrs, they abdicate moral authority in public life. They simply feed into a culture where the law is simply manipulated to suit personal interests. They would have no credibility in public life. They too are subject to the law and the Constitution. They too are accountable as the Constitution dictates.

Johannesburg,  
25 February 2000.